Supreme Court, U.S.
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No. 80-42

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

HOWARD STEVEN STROUTH,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

and

UNITED STATES OF AMERICA,

Respondents,

and

WESTERN UNION TELEGRAPH COMPANY,

Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Federal Communications Commission's (FCC) action in reversing an award of nominal damages by the "Trier of Fact" (the Administrative Law Judge) when violations were proven, violated the public trust and the FCC's mandate as the regulatory agency for confidential telegraphic communications.

II. Whether petitioner's rights of procedural due process were violated by the informal admonition of the United States Court of Appeals for the District of Columbia Circuit when such admonition was used as an excuse for not granting monetary relief or costs to the petitioner.

III. Whether the FCC violated the Supreme Court's mandate as to standards applicable to evidence on damages.

IV. Whether an award of punitive damages, attorney's fees and costs is required by the Communications Act and circumstances of this case.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Howard Steven Strouth respectfully petitions this Court for a writ of certiorari to review the final judgment of the Court of Appeals, docketed March 12, 1980 which, in a "not to be published" opinion affirmed the final decision of the Federal Communications Commission (FCC or the Commission).

OPINIONS BELOW

Initial Opinion of Administrative Law Judge

(Released 10/28/77 See Appendix pp 15a through 95a).

This matter came on for hearing before the Administrative Law Judge (ALJ) in a court room at the FCC in Washington, D.C. The ALJ:

1. Found that three separate violations of the confidentiality of petitioner's telegram had occurred.

2. Found that numerous other violations of the secrecy provisions of the Communications Act (47 U.S.C. § 1, et seq.) (the Act) had occurred both before and after the petitioner's complaint.

3. Found that Western Union's controls over secret communications were "grossly wanting in the performance of its grave statutory duty" (p. 50a, ¶64). Substantial and numerous instances of gross negligence and violations of criminal and civil law were discussed in the opinion.

4. Awarded the petitioner $18.00 in nominal damages.

5. Misapplied rules of evidence on unrebutted evidence of damages, including admissions of Western Union's counsels, and as a consequence, no actual or consequential damages were awarded.

6. No punitive damages were awarded despite the fact that there was substantial evidence that Western Union was continuing to make unlawful disclosures of secret communications.

7. No costs or attorney's fees were awarded despite the provisions of 47 USC §206 which provides for the award of such costs and fees.

Final Opinion of the Federal Communications Commission and of the Review Board

(Review Board Decision Released 4/3/78; FCC Order Denying Review released 10/5/78.) (See Appendix pp. 96a through 119a).

The petitioner appealed the ALJ's ruling on damages, punitive damages, costs and attorney's fees to the review board. The review board opinion, which was adopted as the final opinion of the FCC, upheld all the ALJ's factual findings and then removed the award of even nominal damages to the petitioner, "since it serves no purpose" (p. 105, ¶ 9) and as a consequence dismissed the complaint.

The Judgment of the United States Court of Appeals for the District of Columbia Circuit.

(Docketed March 12, 1980, See Appendix p 144a)

The United States Court of Appeals for the District of Columbia Circuit by opinion filed March 12, 1980 merely affirmed the final ruling of the FCC.

No other orders are relevant to this Petition and none have been included. However, an exchange of letters requested by the U. S. Court of Appeals at oral argument is relevant and have been included as Attachments A, B, and C.

JURISDICTION

(i) The United States Court of Appeals filed its judgment and opinion docketed on March 12, 1980. An extension for filing of this

Petition was granted by this Court until July 7, 1980.

(ii) Petitioner sought no rehearing.

(iii) Petitioners invoke the certiorari jurisdiction of this court under 28 U.S.C. § 1254(1) to review the important federal and constitutional questions presented. 47 U.S.C. § 402(j) also allows appeal to the Supreme Cort by this petition for certiorari.

Cases supporting jurisdiction include: Louisville & Nashville R. Co. v. Ohio Valley Tie Co., 242 U.S. 288, 37 S.Ct. 120 (1916); New York C. & H.R.R. Co. v. U.S., 481, 29 S. Ct. 304 (1909); Time, Inc. v. Firestone, 424 U.S. 448, 96 S.Ct. 958 (1976) and Day v. Woodworth, 13 How. 363, 14 L.Ed. 181 (1851).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution

Amendment [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himdelf, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutes

47 U.S.C. § 206.

Carriers' liability for damages

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case. June 19, 1934, c. 652, Title II, § 206, 48 Stat. 1072.

47 U.S.C. § 207.

Recovery of damages

Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies. June 19, 1934, c. 652, Title II, § 207, 48 Stat. 1073.

47 U.S.C. § 605

Unauthorized publication
or use of communications

Except as authorized by chapter 119. Title 18, no person receiving, asisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception. (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is broadcast or transmitted by

amateurs or others for the use of the general public, or which relates to ships in distress. As amended June 19, 1968, Pub. L. 90-351, Title III, § 803, 82 Stat. 223.

49 U.S.C. § 8

Liability in damages to persons injured by violation of law

In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case. Feb. 4, 1887, c. 10 Pt. I, § 8, 24 Stat. 382; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543.

49 U.S.C. § 9

Remedies of persons damaged; election; witnesses

Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter in any district court of the United States of competent jurisdiction; but such person or persons shall not have

the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit.
As amended Oct. 15, 1970, Pub.L. 91-452, Title II, § 243(a), 84 Stat. 931.

Code of Federal Regulations 47 CFR
§ 1.351. Rules of Evidence

Except as otherwise provided in this subpart, the rules of evidence governing civil proceedings in matters not involving trial by jury in the courts of the United States shall govern formal hearings. Such rules may be relaxed if the ends of justice will be better served by so doing.

STATEMENT OF THE CASE

The petitioner, acting pro se, had approached the FCC informally seeking advice on how to proceed against the Western Union Telegraph Company which, the petitioner alleged, had illegally disclosed the message and billing records relating to a telegram.

An FCC clerk referred the petitioner to an FCC attorney who advised the petitioner of remedies available under the Communications Act (47 U.S.C. §§ 206 and 605) which sections provide remedies for violations of the secrecy provisions of the act, including "for the full amount of damages sustained in consequence of any such vio-

lation"... and "...attorney's fee shall be taxed and collected as part of the costs in the case...". (47 U.S.C. § 206).

Based upon the advice of an FCC attorney, the petitioner, still acting pro se, while under the impression he was proceeding in a forum which had the power to grant full relief, on September 16, 1975, filed a complaint alleging violations of the Communications Act, 47 U.S.C. § 605.

The act of filing the complaint with the FCC according to the provisions of 47 U.S.C. § 207 foreclosed petitioner's suit in a United States District Court, a point that is crucial to the due process argument which follows. The petitioner was never informed by the FCC attorney that any substantial rights had been waived by his election of remedies.

The FCC by order released June 9, 1976, set the matter for hearing, assigning the Common Carrier Bureau of the FCC to represent the public interest and the FCC in prosecuting the action. The petitioner at this time continued to believe no separate counsel was necessary.

While preparing for the hearing, the petitioner was advised by the FCC that perhaps it would be more appropriate if he obtained counsel to represent his interests in the trial before the Administrative Law Judge since somewhat complex matters of evidence, procedure and law were to be involved. Following this advice the undersigned law firm was engaged.

Following substantial discovery the hearing was held before Administrative Law Judge James F. Tierney. Witnesses were called and the evidentiary rules of the Federal Rules of Evidence were purportedly followed in the hearing.

The Violations of Section 605

Substantial evidence was elicited, which was unrebutted, that the violations complained of had occurred, not just in the case of the petitioner, but in hundreds of other instances. Western Union admitted at hearing, subsequent to hearing and even up to the date of oral hearing before the United States Court of Appeals (January 21, 1980), that there had been no remedial measures taken by either Western Union or the FCC.

Damages

Substantial evidence in the form of cancelled checks, affidavits, and testimony was presented at the hearing before the ALJ that the petitioner had incurred damages, costs and attorney's fees, both because of the disclosures and resulting from this litigation. The evidence on damages and costs was unrebutted and some damages were even admitted by opposing counsel.

However, no damages were awarded.

The findings of the ALJ are discussed in summary under "Opinions Below" (supra) and need not be repeated herein.

The Effect of Ultimate FCC Action

The review board, by its opinion, reversed the ALJ's award of even nominal damages. Employing the tricky logic of stating first that the award of nominal damages is unnecessary "since it serves no purpose" and then used the lack of any damages (including nominal) as an excuse for failure to address the much more important question of punitive damages, clearly an act in avoidance of the FCC's statutory responsibility to the public interest under the statute and applicable rules of damages.

The full Commission adopted this fallacious reasoning in failing to review the incorrect opinions of the review board.

The Action by the United States Court of Appeals for the District of Columbia Circuit.

The Western Union Telegraph Company (the real party in interest from whom damages and costs are sought) had been allowed to intervene in the case. During oral argument counsel for Western Union and the FCC conferred and sat at the same counsel table.

The Court of Appeals expressed, during oral argument, obvious displeasure with the failure of the FCC to do anything to correct what was incontrovertably an ongoing practice by Western Union in violation of its "grave statutory duty under § 605 of the act to keep all telegraph communications and related records secret".

Upon questioning by one of the three judges of the panel counsel for the FCC stated in essence that the FCC had done nothing to enforce the correction of the grossly negligent practices of Western Union and that the FCC was awaiting the Court's (the U.S. Court of Appeals') view on the seriousness of the situation before acting. Counsel then indicated that the FCC would immediately take actions to monitor Western Union's corrective actions. The Court then requested counsel for the FCC to write a letter to the Court outlining its view of the degree of seriousness of the criminal violations which admittedly had occurred. Counsel for petitioner was allowed to submit its own response to the FCC's letter to the Court.

Following the exchange of letters, the Court merely affirmed the FCC's prior ruling although allegedly, the FCC had reversed

its position on correction of the violations, as a direct consequence of the Court of Appeals' informal unwritten and unpublished admonition.

From this result, which effectively denies petitioner any relief whatever, (although he had prevailed on the matter of liability, has proven grossly negligent activities which fully warrant punitive damages, as well as substantial actual damages), petitioner respectfully requests this review.

JURISDICTION BELOW

The FCC had jurisdiction granted by Congress in 47 U.S.C. § 207 which gave the petitioner alternate forums, either the FCC or the United States District Court, but not both. Appeal of the cause directly to the United States Court of Appeals for the District of Columbia Circuit was pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(i).

REASONS FOR GRANTING THE WRIT

I. The FCC's Action* in Reversing an Award of Nominal Damages by the "Trier of Fact" (the ALJ) When Violations were Proven, Violated the Public Trust and the FCC's Mandate as the Regulatory Agency for Confidential Telegraphic Communications.

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* Since the FCC's actions were approved by the U.S. Court of Appeals by affirmance on all matters, unless specifically mentioned, the FCC actions includes actions of the U.S. Court of Appeals for the District of Columbia Circuit.

At hearing before the Administrative Law Judge at a "courtroom" in the FCC building in Washington, D.C. the petitioner proved that the violations complained of had occurred in three separate instances. He further proved that hundreds, if not thousands, of similar violations[1] had occurred both before and after the three specific violations of his case. Western Union and the FCC admitted as late as January 21, 1980 (the oral hearing before the U.S. Court of Appeals) that no corrective action had been taken by either the FCC or Western Union.

The ALJ awarded nominal damages of $18.00 which were reversed by the FCC as having "no purpose" (p. 105a, ¶ 9). Because no damages (neither nominal nor actual[2] were proven), the FCC disallowed petitioner's complaint without any award or relief whatever. It even failed to order Western Union to correct its unlawful practices.

Because the trier of fact, the ALJ, found nominal damages and liability was clear, the

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* all matters, unless specifically mentioned, the FCG actions includes actions of the U.S. Court of Appeals for the District of Columbia Circuit.

[1] "The violations" were unauthorized disclosures of confidential telegraphic communications and related billing records. These acts were felonies under 18 U.S.C. § 2511 (1)(c)(d), (effective 6/19/68) and carrying severe civil penalties under 47 U.S.C. § 206.

[2] The petitioner contends that incorrect standards were used by the ALJ and the FCC in evaluating actual, compensatory and punitive damages, see argument, infra, in violation of this Court's mandate in Louisville & Nashville R. Co. v. Ohio Valley Tie Co., supra.

Commission erred in reversing the award. The reversal is contrary to the public interest, normal rules of quasi-judicial regulatory conduct and is directly in contravention to the applicable Federal Rules of Evidence, hence highly improper.

The simple fact of the matter is that the trier of fact found for the petitioner. No new evidence or reason ever existed for reversal by the FCC of its judicial function as a trier of fact. Indeed, the Common Carrier Bureau supported the petitioner throughout the agency proceedings and filed briefs in support of petitioner. Yet, by manipulation of the legal standards applied by the review board, as approved by the full Commission, the prevailing petitioner was stripped of all relief, even though the factual basis for his complaint remained intact. The result: a mere slap on the wrist for the respondent Western Union and an unreimbursed heavy expenditure by the petitioner.

This result must be considered by this Court truly abhorent to the system of justice in these United States. This minipulation and misuse of the public trust by the FCC, in concert with the monopoly it is mandated to monitor, can not be allowed to continue. For this reason alone, the petition should be granted. Failure to grant this petition will, as a practical matter, allow continued and unabated unlawful disclosures by Western Union.

II. Petitioner's Rights of Procedural Due Process Were Violated by the Informal Admonition of the United States Court of Appeals for the District of Columbia Circuit When Such Adminition was Used as an Excuse for Not Granting Monetary Relief or Costs to the Petitioner.

At oral argument on January 21, 1980 it became apparent to the FCC (and to Western Union) that the Court was concerned, perhaps even insensed, over the fact of the on-going violations by Western Union of the Congressional mandate requiring confidentiality of telegraphic communications. Upon questioning from the bench, FCC counsel stated that the FCC was awaiting an indication of this Court's (the Court of Appeals for the District of Columbia Circuit), view before deciding to take any corrective action in monitoring or ordering Western Union to correct its illegal and grossly negligent procedures.

Moreover, the FCC counsel assured the panel that it just then had adopted the Court's view that indeed something was amiss in Western Union's actions and corrective action would be taken. It is petitioner's view that such a change in policy, even if sincere, and in fact implemented (of which petitioner has no knowledge) is simply a smoke screen to avoid the law in assessing liability upon the wrongdoer, in violation of the due process rights of the petitioner.

The Court, in apparently accepting the FCC's representation that it would in futuro, protect the public interest, did nothing to remedy the several wrongs suffered by petitioner. Monetary compensation was denied petitioner (although mandated by Congress) and it is in this entire ratification of Western Union's wrongdoing that petitioner's due process rights were violated.

For the foregoing reasons, the United States Court of Appeals for the District of Columbia Circuit has violated the due process rights of the petitioner and the petition should be granted to hear the merits of this cause.

III. The FCC Violated the Supreme Court's Mandate as to Standards Applicable to Evidence on Damages.

This case is the first case before the FCC where a common carrier was found to have violated the act. The Supreme Court, therefore, has not yet spoken as to how damages are to be evaluated or what legal standards or rules of evidence apply in the context of the facts of this case.

However, in 1916, in interpreting the identical sections[3] of the Interstate Commerce Act (49 U.S.C.), Mr. Justice Holmes said:

> "By §8 a common carrier violating the commands of the act is made liable to the person injured thereby 'for the full amount of the damages sustained in consequence' of the violation. ... By §9 any person so injured may make complaint to the Commission or may sue in a court of the United States to recover damages for which the carrier may be liable under the act, but must elect in each case which of the two methods of procedure he will adopt. The rule of damages in one can hardly be different from that in the other." Louisville & Nashville R. Co. v. Ohio Valley Tie Co. 242 U.S. 288, 37 S.Ct. 120 (1916), emphasis added.

Further, in the consideration of the extent of damages available in the administrative forum,

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[3] Sections 8 and 9 of the Interstate Commerce Act were copied verbatim as §§ 206 and 207 of the Communications Act, thus by analogy, identical reasoning can be strongly argued to be applicable here.

the Court stated:

> "We are of the opinion that all damages that can be properly attributed to an overcharge [a violation of the Act], whether it be the keeping of the plaintiff out of its money... or the damage to its business following as a remoter result of the same cause, must be taken to have been considered in the award of the Commission and compensated when that award was paid." 37 S.Ct. at 122, emphasis added.

What standards the ALJ actually applied are unclear. However, what is clear from the evidence presented to the trier of fact is that:

1. The petitioner was damaged;

2. Out-of-pocket expenditures representing damages did occur;

3. Evidence on damages was presented in cancelled check form;

4. The respondent admitted that the complainant/ petitioner paid expenses representing damages;

5. Testimony and affidavits on substantial damages was unrebutted.

By any rational standard of proof actual damages and consequential damages did occur. The ALJ in assessing damages was apparently just unfamiliar with the proper standards or methods applicable to this case and mandated in Louisville & Nashville R.Co. v. Ohio Valley Tie Co., supra.

Therefore, certiorari should be granted because the FCC and the lower Court have failed

to follow the Supreme Court's mandate for standards of evaluating damages and the appropriate award thereof.

IV. An Award of Punitive Damages, Attorney's Fees and Costs Was Erroneously Denied to Petitioner.

Petitioner was initially advised by a FCC staff attorney, and at a time when he had not retained counsel, that a remedy for his complaint was available by filing a complaint with the FCC. He was never advised that by pursuing this course of action he might waive other rights secured to him if he pursued his remedy in any United States District Court. The statute specifically provides that in any action invoking federal jurisdiction pursuant to the Communications Act, the successful plaintiff is entitled to costs and attorney's fees, as well as punitive damages (47 U.S.C. § 206).

Petitioner, proceeding in good faith and upon advice from the FCC, filed his complaint and then, after the complexity of the matter became clear to him, retained counsel. Counsel were retained only after petitioner's right to proceed in any United States District Court had been waived. Petitioner then incurred substantial out-of-pocket costs for witness, duplication, travel and attorney's fees. Although petitioner prevailed (as that phrase is generally understood), the initial determination that he was entitled to $18.00 for nominal damages, as an "award" was even more inadequate by contrast to the recovery mandated for the identical cause in a federal judicial forum.

If the alternate forum, the United States District Court, had been chosen as the forum in which petitioner proceeded, no question could have arisen as to the jurisdiction to award either

attorney's fees, costs or punitive damages. This authority is clearly conferred by 47 U.S.C. 206, which although the AlJ determined that such authority could not be clearly perceived as within the purview of the FCC. Although there is no authority directly (or even indirectly) preventing the FCC to award fees, costs and punitive damages, the ALJ obviously believed specific statutory authority to do so must exist[4]. Petitioner, on the basis of this Court's holding in Lousiville & Nashville R.Co. v. Ohio Valley Tie Co., supra., took exception to this conclusion.

The Court of Appeals, while expressing interest during oral argument in the appropriateness of awarding punitive damages in circumstances presented by petitioner's case, finally evaded the responsibility of deciding the concrete issues (and awarding costs, fees and damages) by past-argument assurances from the government (see letters attached hereto as Attachments A, B, and C).

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[4] Indeed, there is no authority directly on point which forecloses the award of costs, fees or punitive damages by the FCC. Surely, no one would doubt the Commission's authority to do so, were that its inclination.

If the alternate forum, the U.S. District Court, had been chosen as the forum in which petitioner would proceed, no question could have arisen, as here, as to the jurisdiction to award either attorney's fees and costs or punitive damages. This authority, for a court, is clear under § 207. It is not so clearly within the jurisdiction of the Commission, however, hence one reason for its failure to so award relief.

After having been assured, informally, at oral argument that the FCC, henceforth, would make Western Union promise to be "good boys", the Court of Appeals affirmed the FCC's unsupported finding below that Western Union didn't do anything wrong but anyhow, had corrected its illegal practices ignoring damages and costs properly assessable against the negligent wrongdoer.

CONCLUSION

For the foregoing reasons the petition for certiorari should be granted, for to leave the resolution of the case in the status quo is contrary to the mandate of this Court, contrary to the Federal Rules of Evidence, and countenances the inbred "one hand washes the other" practices of a monopolistic enterprise governing the supervisory agency, all of which is abhorent to the public interest and contrary to the dictates of Congress in the Communications Act.

Respectfully submitted,

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APPENDIX A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 76-500

In the Matter of 40829

HOWARD STEVEN STROUTH, Complainant)	DOCKET NO.20831
v.	
THE WESTERN UNION TELEGRAPH COMPANY, Defendant	File No. TS 4275

MEMORANDUM OPINION AND ORDER

Adopted: June 1, 1976; Released: June 9, 1976

By the Commission: Commissioner Reid absent.

1. We have before us for consideration (1) a formal complaint filed by Howard Steven Strouth (Strouth) on September 16, 1975, pursuant to Section 208 of the Communications Act of 1934, as amended, (the Act) directed against The Western Union Telegraph Company (Western Union) and (2) an answer and a motion to dismiss timely filed on October 22, 1975, by Western Union. Strouth alleges that Western Union unlawfully divulged to a third party a copy of, and additional information concerning, a telegram he sent on September 21, 1974. For the reasons set forth herein, we will designate this matter for hearing to determine whether Western Union has violated Section 605 of the Act.

2. The telegram in question was sent by Strouth from New York City via Western Union addressed to himself in Calgary, Aleberta, Canada, and signed with the name of Bernard Hirschhorn 1/, an attorney in New York City. The purpose of the telegram appears to have been to indicate that Hirschhorn was familiar with certain information relevant to a lawsuit then being prosecuted by Strouth against Norsul Oil & Mining Ltd. (Norsul) in the Supreme Court of Aleberta in Calgary. On September 23, 1974, Strouth prepared an affidavit to which he attached a copy of the telegram for the purpose of offering it as evidence in court. In the affidavit, he presented the September 21, 1974 telegram to be one "...which I have received from Bernard Hirschhorn." Althought the affidavit, which contained other statements relevant to the lawsuit, was admitted into evidence on October 4, 1974, Strouth claims that the telegram and his statement concerning it were never entered into evidence in court.

3. Prior to the October hearing, attorneys for Norsul aparently came into possession of the affidavit and the copy of the telegram attached thereto. 2/ In their pretrial preparation Norsul's attorneys requested the assistance of another attorney in New York City to confirm the telegram. Western Union admits that this attorney, acting on behalf of Norsul, by telephone, "...inquired and

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1/ Strouth admitted that he sent the telegram in a letter addressed to the Commission dated February 11, 1975.

2/ The present record does not reveal whether Norsul obtained a copy of the telegram by normal service of process or by other means. Western Union claims that Strouth provided a copy of the telegram to Norsul's representatives.

received from Western Union employees certain limited information relating to the telegram sent on September 21, 1974." Western Union does not disclose specifically what "limited information" was then given to Norsul's attorney or whether the substance of the telegram was divulged. However, it does appear that information concerning the contents of the telegram could have been divulged during that telephone conversation prior to any presentation by the attorney to Western Union of the telegram Strouth had attached to his September 23, 1974 affidavit. Western Union further admits that Norsul's attorney subsequently was given a copy of the telegram from its files and the symbols on the telegram were explained to him. Finally, Western Union admits that thereafter on October 3, 1974, one of its employees executed an affidavit prepared by Norsul's attorney specifying information previously given to him by Western Union employees concerning the telegram and attaching to it the file copy of the telegram. 3/ The record does not reveal whether Norsul's attorney at any time presented a copy of the telegram attached to Strouth's September 23, 1974 affidavit to Western Union before obtaining the file copy of the telegram

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3/ The affidavit stated in pertinent part the following information concerning the telegram:

(1) The telegram was sent on September 21, 1974, at 11:28 p.m. eastern dayling time.

(2) The telegram was called in from telephone number (212) 322-8700 which appears in the Queens telephone directory as the number for the Hilton Inn at JFK Airport.

(3) The telegram was charged to Dr. Howard Strouth, 120 Wall Street, New York, N.Y. 10004, telephone number (212) 944-4065.

sent by Strouth to himself bearing Bernard Hirschhorn's signature. As a result of Western Union's alleged unlawful divulgence of the telegram and information concerning it, Strouth claims that additional hearings were held in both Calgary and New York City, requiring his attendance or that of his attorney, and additional legal fees and expenses were incurred. 4/ He therefore asks us to award him $10,000 in damages and to assess punitve damages against Western Union.

4. Western Union denies that it unlawfully divulged information concerning the telegram in violation of Section 605 of the Act since, it asserts, the full text of the telegram had been divulged by Strouth prior to the acts of its employees. Western Union argues that, once the telegram was published by Strouth, its existence, contents, substance, purport, effect or meaning had already been divulged and hence could be confirmed by Western Union employees without violation of Section 605. It concludes that the effect of the actions of its employees was to authenticate that which had already been

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3/ Continued:

(4) The individual calling in the telegram gave his name as Bernard Hirschhorn and his telephone number as that of the Hilton Inn at JFK Airport.

4/ A Commission of Inquiry was instituted by the Supreme Court in Calgary to investigate the circumstances surrounding the telegram by taking the deposition of Hirschhorn in New York. Hirschhorn denied sending the telegram in his deposition. We are informed that Strouth's suit against Norsul in Calgary court is still proceeding.

already been divulged. Finally, Western Union contends that Section 605 does not prohibit disclosure of the name, address and telephone number of any person billed for a telegram and claims that this was the only information divulged by its employees not evident on the telegram previously disclosed by Strouth in his September 23, 1974 affidavit.

Discussion

5. Western Union seeks dismissal of the complaint on grounds that Strouth did not verify it in accordance with Section 1.721 of the Commission's Rules because he failed to state that he believed the complaint's allegations to be true. We will deny the motion to dismiss. We do not agree that failure of the verification provided in the complaint to specifically state that Strouth believes the allegations contained therein to be true violates Section 1.721 of our rules. That rule merely provides a suggested form of verification for formal complaints filed thereunder. It clearly provides that:

> "The following form may be used in cases to which it is applicable, with such alterations as circumstances may render necessary." (Emphasis added.)

Strouth has advised that the form of verification he used was the only one acceptable to the United States Consul in Costa Rica. 5/ We believe that the form used constitutes an alteration in our suggested form rendered necessary by the requirement of the United States Consul. Furthermore, we view the form of verification

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5/ Strouth resides in San Jose, Costa Rica.

provided to be in substantial compliance with Section 1.721 of our rules. Stroth has made certain representations in the complaint and has verified that he has been informed of the contents thereof. Therefore, we will hold him no less responsible for the truthfulness of those representations than we would had the form of verification suggested in our rules been used. The purpose of our procedural rules governing complaints is to make it easy, not difficult, for users of common carrier services to assert their rights under the Communications Act. In addition, these rules are designed to give a defendant notice of the nature of a claim and of the theory upon which the complainant seeks relief. We have previously made clear our intent that our procedural rules governing complaints should be liberally construed to achieve these objectives. The Bunker-Ramo Corp. et al., 25 FCC 2d 691, 696 (1970).

6. We now turn to the merits of the complaint and consider whether it states a cause of action under the Communications Act. For this purpose we must accept as true the material allegations therein. Conely v. Gibson, 355 U.S. 41 (1957). The issue therefore becomes whether Western Union violated Section 605 of the Communications Act by supplying a file copy of, and additional information concerning, the telegram to one other than its sender or addressee. Section 605 provides, in part:

> "...no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through author-

> ized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority."

The original purpose of section 605 was to prohibit blatant public or private encroachments on the privacy of telecommunication messages and to ensure the integrity of the communications system. Nardone v. United states, 302 U.S. 379, 383, 58 S.Ct. 275, 82 L. Ed. 314 (1937). Section 605, as amended in 1968, is designed to regulate, among other things, the conduct of communications common carrier personnel by prohibiting unauthorized divulgence of interstate communications by persons assisting in receiving or assisting in transmitting such communications. S.Rep. N. 1097 90th Cong., 2d Sess. (1968); 2 U.S. Cong. & Admin. News (1968) p. 2197.

7. We have in the past ordered a hearing to determine whether certain carriers had violated Section 605 and whether damages should be awarded for such violation. Sidney Gelb et al., 21 FCC 2d 407 (1970); 30 FCC 2d (1971). We believe that Section 605, when read in conjunction with other provisions of the Act, vests in the sender of a telegram the right to seek an award of damages for injuries sustained as the result of a carrier's unlawful

divulgence of its "existence, contents, substance, purport, effect or meaning." Section 206 of the Act provides that if any carrier commits an act prohibited by the Act, the carrier may be held liable for damages; and, under Section 207 "any person" claiming to be so damaged by a common carrier may either make a complaint to this Commission requesting damages or file suit in federal district court. If a complaint is filed with this Commission, Section 209 sepcifically authorizes us to award damages after a hearing on the complaint. We therefore conclude that Strouth, as the sender of the telegram, is entitled to seek damages from Western Union as the carrier of the telegram for injuries sustained as the result of any unlawful divulgence in violation of Section 605.

8. The prohibitions of Section 605 apply to those employees of a carrier who have intimate knowledge of the content of a communication. The section recognizes that the integrity of the communications system demands that the public be assured that employees of carriers who come to know the content of messages will in no way breach the trust which such knowledge imposes on the. United States v. Russo, 250 F. Supp. 55, 59 (Eastern District, Pennsylvania, 1966). "Persons" within the meaning of the section include both the carrier itself and persons employed by the carrier. United States v. Finn, 502 F. 2d 938, 942 (7th Cir, 1974). Carriers are responsible for violations committed by their employees. Moreover, it has been held that Section 605 specifically applies to telegram operators who either learn the content of the message or handle a written record of communications in the course of their employment. United States vs. Russo, supra, p. 59. Although we are unable to determine from the

record before us the identity of the persons who provided over the telephone "limited information" to Norsul's attorney concerning the Strouth telegram, Western Union admits that they were its employees. In addition, Western Union's employee who subsequently executed the affidavit prepared by Norsul's attorney stated that he was an "...employee of Western Union, fully conversant with the transmission, routing and billing of the telegrams transmitted in the normal course of the business day." Therefore, it appears that those emloyees of Western Union who disclosed information concerning the telegram were bound by the restrictions of Section 605 and that Western Union is thereby liable if any unlawful acts were committed by them in doing so.

9. The basic question before us therefore is whether any of the following alleged acts by Western Union's employees constituted an unlawful divulgence within the meaning of Section 605: (1) the disclosure during a telephone conversation with the New York attorney acting on behalf of Norsul of certain "limited information" concerning the telegram; (2) the disclosure in an affidavit signed by Western Union's Manager of Customer Services of certain information concerning the telegram; and (3) the attachment of a file copy of the telegram to that affidavit. Divulgence within the meaning of Section 605 has been defined as the transmitting of a message to a third person without the consent of the sender. U.S. v. Gruber, 123 F. 2d 307, 309 (2d Cir 1941). We note that Western Union has not claimed to have had the direct consent of the sender of the telegram, whether he was either Strouth or Mr. Hirschhorn. Moreover, at least on the present record none of the acts of Western Union's employees

appears to be conduct exempted under the provisions of Section 605 from the general rule against divulgence. 6/ Western Union makes no claim that disclosures its employees made were in response to a subpena issued by a court of competent jurisdiction or on demand of other lawful authority. We therefore must consider whether the alleged actions of Strouth in filing the copy of the telegram in court or otherwise making a copy of it available to representatives of Norsul prior to the actions of Western Union's employees constituted implied consent to divulge or publish its existence or contents.

10. Even if, assuming arguendo, Western Union is correct in contending that once a communication has been made a matter of public record by its sender, subsequent disclosure of its existence and contents by the carrier for the purpose of confirming that which has been made a matter of public record would not violate Section 605 on the theory that all persons are presumed to have constructive knowledge of what is part of the public record, it is not clear on the present record whether the telegram was ever divulged by the sender, recipient or agent prior to the acts of Western Union's employees in question. Western Union has not established the date upon which the telegram was allegedly filed in the Supreme Court of Alberta. More important, Western Union fails to make any showing that the alleged filing of the telegram in the Calgary proceeding

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6/ Clauses (2) through (6) of Section 605 are intended to be exceptions to the rest of the first sentence, thus listing the persons to whom communicatons can be divulged. United States v. Finn, supra, p. 942.

actually made it a matter of public record. On the contrary, Strouth asserts that the telegram was never "used" in court as evidence in that proceeding. Finally, we are unwilling to accept on the record before us Western Union's argument that it was relieved from the restrictions of Section 605 when Strouth provided a copy of the telegram to Norsul. Section 605 clearly proscribes divulgence or publication of an interstate or foreign wire communication "...to any person other than the addressee, his agent, or attorney..." except for those exceptions in clauses (2) through (6). (See footnote number 6.) We find no support for Western Union's contention that the statute allows a carrier to divulge a telegram to a third party for purposes of verifying its existence and contents on the theory that the sender has implicitly consented to such divulgence merely by providing a copy of the message to the third party. The mere possession of a copy of a telegram by a third party, in and of itself without a more convincing manifestation of intent, certainly does not indicate either express or implied consent of the sender to its divulgence by a carrier.

11. Furthermore, we reject Western Union's argument that Section 605 does not prohibit the disclosure of telegraph company billing records. Western Union's reliance is misplaced on cases holding that disclosure for submission as evidence in a criminal proceeding of telephone toll records kept in the ordinary course of business by telephone companies is not proscribed by Section 605. 7/ The holdings

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7/ See United States v. Covello, 410 F. 2d 536 (2d Cir. 1968), cert. den., 396 (U.S. 879 (1969); U.S. v. Cerone, 452 F. 2d 274, 289 (7th Cir. 1971), cert. den., 92 S. Ct. 1169;

of these cases with regard to telephone toll records have never been extended to telegraph records of any form. Section 605 seeks to protect the integrity of communications from unscrupulous common carrier employees who are in a position to have knowledge of either the contents thereof, or both. 8/ Telephone calls are "fleeting and ephemeral things." Russo, supra, p. 59. Telephone company accounting and toll records do not show, nor can they be associated with, any records of either the content or substance of conversations or the identity of the particular persons engaged in them. Moreover, those telephone company employees handling accounting and toll records have no means of obtaining such knowledge. However, telegraph billing records are associated with a copy of the message sent, the name of the person sending the telegram, and the name of the person to whom the telegram is sent. Thus, telegraph company employees having access to the billing records of a

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7/ Continued

U.S. v. Bernard, 490 F. 2d 907, 913-914 (9th Cir. 1973), cert. den., 416 US 959; U.S. v. Kohne, 347 F. Supp. 1178, 1183 (D.C. Pa. 1972).

8/ Section 605 was derived from Section 27 of the 1927 Radio Act by applying identical language to wire as well as radio communications. Like telegraph operators, radiogram operators have access to the content of the communication as well as the parties involved. Thus, the idea of Section 27 in prohibiting the divulgence of such information was carried on by Section 605 as it applied to wire communication.

telegram also have access to both the content and substance of the message and the identity of the parties to the communication. Section 605 proscribes the divulgence of such information by common carrier employees except in response to a subpena issued by a court of competent jurisdiction or on demand of other lawful authority.

Conclusions

12. There appear to be questions of fact which must be resolved before we can determine whether Western Union has violated Section 605. The attachment of a file copy of the telegram to the affidavit clearly did divulge the subject matter and contents of the message and the identity of the parties involved. There is inadequate information to determine whether the Western Union employees who divulged such information had the consent of the sender to do so. Furthermore, we are not provided with the extent of the information concerning the telegram orally given by Western Union employees to Norsul's attorney. Our record does not reveal what the "limited information" orally provided to Norsul's attorney during his telephone conversation with unnamed employees of Western Union prior to the execution of the affidavit was. Nor are we provided with the date of this conversation which Western Union admits took place. Finally, we are unable to determine the extent of the damages, if any, allegedly suffered by Stroud. Accordingly, we will designate this matter for evidentiary hearing.

13. In view of the foregoing, IT IS ORDERED, That pursuant to the provisions of Sections 4(i), 4(j), 206, 208, 209, 409 and 605 of the Communications Act of 1934, as amended, this matter is designated for hearing on the following issues:

(1) Whether Western Union has violated Section 605 of the Communications Act; and

(2) what damages, if any, should be awarded to Strouth for any violation found under issue (1).

14. IT IS FURTHER ORDERED, That the hearing in this proceeding shall be held before an Administrative Law Judge at a time and place to be specified by sebsequent order; and that such Administrative Law Judge shall upon closing of the record, prepare and issue an initial decision, which shall be subject to the submittal of exceptions and requests for oral argument as provided in Sections 1.276 and 1.277 of the Commission's Rules (47 C.F.R. Sections 1.276 and 1.277), after which the Commission shall issue its decision as provided in Section 1.282 of the Commission's Rules (47 C.F.R. Section 1.282).

15. IT IS FURTHER ORDERED, That Mr. Howard Steven Strouth and The Western Union Telegraph Company and the Chief, Common Carrier Bureau, are made parties to this proceeding.

16. IT IS FURTHER ORDERED, That the burden of proof with regard to the issues specified herein shall be upon Strouth.

17. IT IS FURTHER ORDERED, That, where appropriate, the burden of production of relevant evidence shall be assigned by the Administrative Law Judge to such party as is in exclusive control of evidence.

18. IT IS FURTHER ORDERED, That Western Union's motion to dismiss is hereby DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Vincent J. Mullins
Secretary

FCC 77D-55

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Howard Steven Strouth, Complainant v. The Western Union Telegraph Company, Defendant	))))	Docket No. 20831 File No. TS 42-75

Appearances

Walter T. Charlton, T. Paul Imse, Jr. and William Tupling, Esqs. (Charlton, Imse and Tupling) on behalf of Howard Steven Strouth, Complainant; Joel Yohalem, Peter G. Wolfe and Peter J. Monaghan, Esqs. on behalf of Western Union Telegraph Company, Defendant; and Jacob W. Mayer, Ella U. Owens and James O. Juntilla, Esqs. on behalf of Chief, Common Carrier Bureau, Federal Communications Commission.

Initial Decision of Administrative Law Judge James F. Tierney

(Issued: October 19, 1977;
Released: October 28, 1977)

Preliminary Statement

1. This case was set for hearing by Memorandum Opinion and Order, FCC 76-500, released June 9, 1976, wherein the Commission determined that an evidentiary hearing was necessary to resolve the merits of a complaint filed by Howard Steven Strouth (hereinafter

Strouth, Plaintiff or Complainant) under Section 208 of the Communications Act, as amended, (the Act) directed against The Western Union Telegraph Company (hereinafter Western Union or Defendant). Strouth Alleges that Western Union unlawfully divulged to a third party a copy of, and additional information concerning, a telegram he sent on September 21, 1974. Premised on his complaint, Strouth charges that Western Union has violated Section 605 of the Act and as a consequence in the complaint before the Commission he was entitled to an award of $10,000 in damages and an assessment of punitive damages against the Defendant.

2. In considering the various positions of the parties, Strouth and Western Union, among other things in the prefatory language of the aforesaid Memorandum Opinion and Order, the Commission stated in response to certain Western Union pleadings respecting the complaint:

> "... Western Union fails to make any showing that the alleged filing of the telegram in the Calgary proceeding [in the Supreme Court of Alberta, Canada] actually made it a matter of public record."
> "[And that][t]he mere possession of a copy of a telegram by a thrid party, in and of itself with a more convincing manifestation of intent, certainly does not indicate either express or implied consent of the sender of a telegram to its divulgence by a carrier."
> (Memorandum Opinion and Order, page 7.)

Indeed, the Commission emphasized "... we reject Western Union's agreement that Section 605 does not prohibit the disclosure of telegraph company billing records." (Id.)

3. Further, the Commission noted:

> "... telegraph billing records are associated with a copy of the message sent, the name of the person sending the telegram, and the name of the person to whom the telegram is sent. Thus, telegraph employees having access to the billing records of a telegram also have access to both the content and substance of the message and the identity of the parties to the communication. Section 605 proscribes the divulgence of such information by common carrier employees except in response to a subpoena issued by a court of competent jurisdiction or on demand of other lawful authority." (Memorandum Opinion and Order, page 8.)

4. Suffice to say, in alluding to information before it, provided by the contesting private parties, the Commission while concluding that "the attachment of a copy of the telegram to the affidavit [given by Western Union to a third party] clearly did divulge the subject matter and contents of the message and the identity of the parties involved," nevertheless, also concluded that the facts before it were insufficient to precisely spell out the full dimensions of the nature and extent of the alleged violation by the Defendant or the extent of the damage suffered by the Complainant. Hence, it determined that a full hearing was necessary to assay and to assess Complaintant's claim. Invoking the provisions of Sections 4(i), 206, 207, 208, 209, 409 and 605 of the Act, the following issues were designated for trial:

(1) Whether Western Union has violated Section 605 of the Communications Act; and

(2) what damages, if any, should be awarded to strouth for any violation found under issue (1).

Besides the Complainant and Defendant, the Chief, Common Carrier Bureau was made a party to the proceeding.

5. A prehearing conference was scheduled for August 11, 1976. At the request of the Complainant, the prehearing conference was rescheduled for August 31, 1976. Subsequently, again at Complainant's request, the prehearing was set for September 8, 1976. The first prehearing conference was held on that date wherein the customary procedural arrangements covering exchange of direct cases of the parties and the notification of witnesses were agreed upon. Because of the uncommon nature of the issues to be tried, at the suggestion of the Bureau, the parties were directed to file briefs on or before October 26, 1976, on the proposition of the nature and extent of authority of the Presiding Judge to assess or award damages.

6. Elaborate in-depth Discovery procedures were pursued by the private parties which continued up to the commencement of the hearing. On October 6, 1976, counsel for Complainant sought a 45-day extension of time within which to respond to interrogatories of the Defendant premised on the ground that Complainant was travelling in Europe and was not otherwise available. As set forth in Order, FCC 76-M-1312, released October 12, 1976, that request was denied but a period of 21 days was nevertheless allowed to permit compliance.

7. The three parties filed the requested briefs on the scope of damages proposition on October 26, 1976. The Common Carrier Bureau and Strouth argued that the Presiding Judge has authority to award punitive damages while Defendant, Western Union, urged to the contrary as being beyond the bounds of his jurisdiction.

All parties agreed that the element of damages and their scope were appropriate subjects prior to the commencement of trial. By Memorandum Opinion and Order 1/ the Presiding Judge ruled that under statutory principles and case law precedent, he lacks authority to assess and award punitive damages and further ruled that the parties were free to seek review of his ruling without the customary pleadings in petition. As might be expected, the losing parties chose to do so; on the other hand the Defendant, in support of the ruling, filed an opposition to the appeals.

8. Though this prefatory statement may reach undue length and might otherwise be assigned to a suffix or annex to this disposition, it would appear better to suffer the burden of the seemingly prolix to render a chronicle of the natural unfolding of events in this uncommon, if not a first impression, case. In the energetic pursuit by the private parties of the pretrial prerogatives under Discovery an unusual wealth of disparate claims and defenses were asserted proviking broad questions of "attorney-client privilege" and the refuge from Discovery of genuine "lawyer's work-product."

9. Before disposing of the conflict claims and defenses of the private parties on the matters of "privilege" and "work-product" the Presiding Judge invited the Bureau to address itself to the opposing positions (which it did) as a kind of neutral party endowed with special expertise not necessarily in the general rule of law but certainly in the commercial ways and habits of common carriers. By Memorandum Opinion and Order, FCC 76-M-1529, November

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1/ FCC 76-M-1453, released November 9, 1976.

23, 1976, the Presiding Judge defined the parameters of the "attorney-client privilege" and the "work-product" rule for the purposes of this proceeding, refused to permit Complainant to depose certain management personnel of Western Union and provided for in camera inspection of certain documents in Defendant's possession prior to ruling suggested by Complainant.

10. On November 29, 1976, an informal off-the-record conference was convened to afford an opportunity to conduct the in camera document inspection contemlated. On December 23, 1976, Western Union directed an interrogatory to Strouth based on certain material turned over at the November 29 conference. This pleading as well as a number of subsequent related pleadings were filed in a manner to preserve its supposed non-public or confidential character (Order, January 7, 1977, FCC 77-M-47). While both Western Union and the Bureau urged compelling disclosure, the ruling upheld Strouth's claim of attorney-client privilege and hence could not be used in examining him.

11. On December 9, 1976, Strouth gave notice of intent to take oral deposition of Jerry L. Campbell, a former employee of Western Union and specified that if Campbell wished to invoke a Fifth Amendment he should do so by November 20, 1976. Through counsel, Campbell subsequently on December 2, 1976, wrote Strouth's counsel to advise that he would assert his Fifth Amendment privilege. Thereupon, Strouth asked of the Presiding Judge that steps be undertaken pursuant to 18 U.S.C. Sections 6001-2, 6004, to grant Campbell immunity so that his testimony could be compelled.

12. To resolve the problems underlying Campbell's position, Stroth sought and was denied a 90 day continuance in the scheduled hearing, (Order, FCC 76-M-1636, released December 15, 1976). On December 21, 1976, the Bureau, under the applicable procedure in this agency formally requested this agency's General Counsel to assist in obtaining a grant of immunity for Campbell to the end that his testimony, as being necessary in the public interest, might be compelled. The Attorney General of the United States subsequently authorized or affirmatively concurred in the requested grant to Campbell to the end that his testimony could be compelled.

13. Further prehearing conferences were held on January 4 and 5, 1977, to consider and dispose of pending procedural matters. A new hearing date was also set for February 22, 1977, in lieu of January 11, 1977.

14. On Januay 27, 1977, Stroth filed a Motion for Summary Decision and Western Union countersued for similar disposition on February 10, 1977. At a further prehearing conference on February 14, 1977, the private parties agreed to withdraw their motions. A final prehearing conference was held on February 18, 1977. The hearing commenced on February 22, 1977 and continued intermittently until March 9, 1977.

15. At the hearing session on February 25, 1977, the parties were invited to file briefs addressed to the question whether the Presiding Judge has authority to award either attorneys fees or costs generally to the plaintiff complainant. The parties filed the requested briefs on or about March 28, 1977. The record was ultimately closed by Order on May 20, 1977. All parties eventually filed comprehensive proposed

findings of fact and conclusions of law as well as reply briefs.

This, as an Initial Decision, SHALL FIND that Defendant Western Union on three separate occasions violated Section 605 of the Act; but since no proximately caused consequential damages were suffered by Complainant only an award of nominal damages can be justified.

FINDINGS OF FACT

16. The Complainant (sometimes hereinafter Plaintiff) in this proceeding, Howard Steven Strouth, was born in Frankfrut-am-Main, Germany, where he attended the Goether Gymnasium. He later transferred to a public school in England and continued his education at the London Polytechnic Institute. Still later he attended Cambridge University, took some courses at the University of Milan, Italy and eventually graduated as a mining engineer from the Sorbonne, France.

17. At the outbreak of World War II Strouth served with the French Armed Forces and sometime in 1941 emigrated to the United States when he entered and subsequently served in the Army of the United States and at the Nuremburg Trials in post-war occupied Germany. He returned to the United States sometime in 1946 retaining a reserve Army commission and retired with the rank of Major in 1969. Although awarded the title "doctor" for some lectures at Bretton Woods, Indiana, he uses the title as a "vanity exercise" because especially in Latin America "one is not totally accepted as a professional" without that title. Whatever his customary title, Strouth was involved in a variety of enterprises as a mining engineer and promoter following World War II.

18. One of the companies with which Strouth was associated was Norsul Oil and Mining. His relationship with this company indirectly led to this controversy. Norsul was a holding company formed from an earlier company for the purpose of exploiting an oil concession in Ecuador. Strouth had been an organizer of Norsul in 1961 and was its Managing Director from 1961 until he left the firm in 1971. At that time, he sold his interest in Norsul in return for a cash sum and a series of promissory notes with the object of recovering money owed him by the company and to enable him to sell his shares in the company without contravening U.S. Security and Exchange Commission's (S.E.C.) restrictions which might affect him while he had been in a position of control. It would appear that Strouth received $130,000 in cash plus a series of notes in the amount of $55,000 each, totalling approximately $350,000.

19. In the fall of 1974, Strouth was engaged in two separate litigations in Canada. The first involved a lawsuit in the Province of Ontario against Phoenix Oil and Mining Co. and as a result of that litigation Strouth was awarded a judgment in the amount of $110,000 by the court. The second lawsuit was in the Province of Alberta, in the City of Calgary where Strouth was suing for the collection of notes due. Counter claims had been filed by Norsul in that case. Learning that Strouth had received a judgment in another province, Norsul sought and gained an injunction issued by Mr. Justice Kirby of the Supreme Court of Alberta blocking distribution of the judgment funds to Strouth. At that time Strouth was in Costa Rica where he maintained his residence and attended to his several business investments and ventures located in other parts of the world.

20. Upon receiving a telephone call from his attorney, a Leslie Duncan, with offices in Calgary, Canada, Strouth hurriedly gathered together letters and other documents in an effort to oppose and remove the injunction issued by the Court in Calgary. Strouth had been asked by attorney Duncan to get documents and proof together and make it back to Calgary. It would appear that Strouth undertook various steps to butress the documentation requested by attorney Duncan including the dispatch of cables and telegrams to business associates in other parts of the world. Strouth then left Costa Rica for Calgary with the materials he had gathered stopping en route in New York City.

21. Strouth arrived late at night at the John F. Kennedy International Airport and checked into an airport hotel, the Hilton Inn. After he had checked in, while attempting to make phone calls and charge them to his hotel bill, he was informed by the hotel operator that he could not charge calls to his hotel room. Then Strouth attempted to telehone Bernard Hirschhorn, his New York attorney, who he felt might be of assistance in providing confirmation that Norsul management had been on notice of Strouth's dealings with the Phoenix Company (which had a corporate relationship with Norsul).

22. Bernard Hirschhorn is a friend of Strouth's and had served with him in the military and has acted as an attorney both for Strouth and members of Strouth's family. Also, Hirschhorn had been an officer and director of Norsul and, consequently, would have been a logical person to confirm Strouth's story. Strouth called Hirschhorn at his home between 11:30 p.m. and 12:00 p.m. on the night of September 21, 1974, and asked Hirschhorn to send him a telegram in Calgary which could be used in the Norsul

proceedings. It would appear that Hirschhorn explained that such a telegram would serve no useful purpose and that Hirschhorn refused to send the requested telegram himself but authorized Strouth, if he so chose, to do so himself. Strouth did in fact that evening send himself the telegram to Calgary in Hirschhorn's name. Hirschhorn did not, however, recollect the telephone call but did not deny the possibility that he might have received it since he received a fairly large number of calls from Strouth. He denied that he authorized the sending of the telegram or that the telegram was sent with his knowledge.

23. While there is an apparent conflict in the versions of the incident between Strouth and Hirschhorn, a lausible, thus reasonable, resolution of that conflict would permit the notion that inasmuch as Strouth probably spoke with Hirschhorn on the night of September 21, 1974, and though Hirschhorn may not have authorized Strouth to send the telegram, Strouth in fact thought he had such an authorization, at least implicitly, and thus proceeded to send it.

24. As noted earlier, because the Hilton Inn at Kennedy Airport, unlike a great number of hotels, did not permit or accept charges for outside services for its customary overnight guests, Strouth resolved that problem by calling Western Union, identifying himself and charging the telegram to the telephone at his New York office. While Strouth testified that he identified himself when he phoned in the telegram, Jerry L. Campbell, a former Western Union employee, thought on the basis of Western Union records Strouth had identified himself as Hirschhorn. As the Bureau urges, it is more reasonable to accept Strouth's version inasmuch as he charged the call to his New York office

and that apparently Western Union had checked with the hotel to confirm that Strouth was staying there before they accepted the charges. And as Strouth observed "obviously no one can call up and say please charge this to John D. Rockefeller."

25. Strouth continued his trip early the following morning and reached Calgary in the afternoon of Sunday, September 22, 1974. He thereupon searched for the telegram which he eventually located but made no effort to contact Hirschhorn to provide him with the exact text of the telegram. Strouth gave a copy of the telegram to his local attorney, Duncan, the following morning but did not inform him at that time that the telegram had not been sent by Hirschhorn. Duncan attached the telegram to an affidavit which was then furnished to a Mr. Code, counsel for Norsul, on the morning of September 23, 1974. Code examined Strouth on this affidavit subsequent to its attestation under oath by Strouth but prior to its filing on September 30, 1974, in court, the Supreme Court of Alberta Judicial District of Calgary. At that time, it went in a court file presumably available for inspection by the public at large and has not been withdrawn since then. Strouth's thesis that the affidavit was not before the court because of an ongoing strike of court employees is clearly undermined by the unrebutted testimony of Barrister Code that the Courts remained in operation during the strike.

26. The hearing on Strouth's application to lift the restraining order was scheduled for October 4, 1974, and in preparation for this hearing Barrister Code telephoned Hirschhorn to discuss Strouth's options with the Phoenix Company and, to Code's surprise, Hirschhorn would not say if he had sent the telegram and

Code concluded that he had not done so. On the same day, Code telephoned a Mr. Atkins, an attorney with the firm of Whitman and Ransom, in New York City and instructed him to investigate the telegram. Specifically, Code told Atkins to find out where the telegram came from and to find out all he could about it. He did not, however, tell Atkins how to get the desired information from Western Union.

27. Atkins began his investigation by calling the number on the telegram read to him by Code in order to learn who might answer--the number proved to be that of a pay phone in the lobby of the Hilton Inn at Kennedy Airport. Next Atkins called a number listed in the telephone directory for public service or customer service at Western Union. He reached a man at Western Union but does not know who it was. He informed that person that he was an attorney, that he had the text of a telegram, which involved court proceedings and that time was of the essence in gaining all the information concerning it. This persuaded the Western Union person that Atkins' situation would permit an exception to the usual restrictions on the release of otherwise protected or confidential information and he agreed to provide Atkins with a file copy of the telegram if Atkins would send a messenger for it. Atkins denied that he offered any improper inducement to obtain the file copy or that he told the Western Union person he was Strouth's attorney.

28. The file copy provided Atkins contained additional information on it beyond that which Atkins already knew and he then took it to a nearby Western Union office to get an explanation of the symbols on it. He talked to a woman but does not know her name. She did not question Atkins' possession of the file copy

and explained what he gave her; however, she did not try to confirm it. Atkins did not offer her any inducements for her help.

29. Since they were pressed for time, Atkins prepared an affidavit describing what they understood about the file copy of the telegram including the fact that it had been telephoned in from the Hilton Inn, the number to which it had been billed (Strouth's New York office) and the fact that it had apparently been sent by Strouth. He then took it to Western Union's main office. When he got there, he asked to see someone qualified to attest to the information in the proposed affidavit, and ultimately ended up at Mr. Campbell's desk. Campbell was Manager of Customer Services at the Western Union Office at 60 Hudson Street.

30. According to Atins he told Campbell that he wanted someone to verify the information in the draft affidavit because he wanted to take it to calgary that afternoon and time was of the essence. Further, he states that he told Campbell that he is an attorney and that the affidavit would be used in court, but he denies that he ever told Mr. Campbell that he was Strouth's attorney. Atkins is sure that he explained the background of the matter to Mr. Campbell; that Mr. Campbell knew that the telegram had been used in a Canadian court; and that Campbell knew he was Strouth's adversary. Atkins could not recall whether Campbell tried to confirm the accuracy of the affidavit despite the fact that Campbell thought Atkins should not have had the information to begin with. Even so, Campbell did finally sign the affidavit. And both Atkins and Campbell agree that no inducement was offered for signing the affidavit. After obtaining the notarized affidavit, Atkins took it to Calgary and stayed there for one day

to be available to testify, although he finally did not have to do so.

31. Campbell's description of their encounter differs from Atkins' in some material respects. According to Campbell, when Atkins brought the draft affidavit to him and asked him to verify it Atkins said that he was going to Canada with it but that it would not be used in a court of law. Campbell either did not know or could not recollect why Atkins wanted the affidavit under oath. Further, Campbell testified several times that Atkins said he was representing Dr. Strouth. On other occasions, however, he conceded the possibility that Atkins may have said only that he was an attorney and that Campbell had misunderstood Atkins' statement.

32. Whether Atkins told Campbell he represented Strouth is of importance in assaying the confilicting positions. First, during Western Union's in-house investigation of the disclosure, which was concluded as far as Campbell's role by December 11, 1974, he did not tell the investigator, a Mr. Gordon (Defendant's, Chief of Security and assistant vice president), that Atkins had identified himself with Strouth. Campbell attributes this oversight to a lapse of memory. It nonetheless surprised Gordon whe he learned of it. Second, Campbell was on the witness stand between hearing sessions. Despite the fact that sequestration of witnesses had been ordered at the request of Strouth's counsel, it developed that Campbell discussed the case with Strouth's counsel between the hearing sessions of February 22 and February 23, 1977, while he was on the witness stand, and was told about Atkins' testimony and the fact that he had already denied having claimed to represent Strouth. Thus, although Campbell was

surprised at the position attributed to Atkins, it is not implausible that he moderated his own statements in light of his knowledge of Atkins' prior testimony to avoid involvement in testimonial conflict. In considering these matters, however, Campbell conceded that his memory on the witness stand was not so great. Thus, Campbell's testimony on whether Atkins told him that he represented Strouth is at least questionable and not wholly convincing.

33. While the request by third parties seeking verification of telegraph messages was unusual, this did not upset Campbell who felt that the decision to provide the verification was within the scope of his responsibilities. He was aware of Section 605 and of Tariff Rule 24 but did not feel that he was giving Atkins any new information. And at the time it did not occur to Campbell to call the Western Union Law Department even though his superior at 60 Hudson Street, a Mr. Chestna, testified that he felt Campbell did not require him to identify himself or to show credentials nor did Atkins, on his own account, produce or show any identification. Instead, Campbell verified the telephone number at the Hilton and then notarized the affidavit in Atkins' presence. Inter alia, Campbell felt that whoever called in the telegram had identified himself as Hirschhorn. While Campbell may have so concluded, other facts would suggest that Strouth must have identified himself as the sender, e.g., charging the telegram to his own New York office telephone account.

34. Strouth soon learned from his Calgary counsel, Duncan, that the opposing counsel, Code, appeared to have knowledge of details of the telegram of September 21st which had not previously been disclosed. At about this time,

apparently, Strouth talked to Hirschhorn and learned that he was planning a retraction of the telegram. While Strouth was not too happy with this development, he gave his consent for the retraction. It was at about this juncture that Strouth felt it necessary to tell Duncan that he had sent the telegram, albeit with Mr. Hirschhorn's consent. With this information in hand, Duncan decided that he did not need to rely on the telegram and would so advise the court. Justice Kirby subsequently released Strouth's funds.

35. Hirschhorn first learned of the telegram when he received a call from a Canadian attorney representing Norsul. He feels that this was conceivably Code; Hirschhorn was presumbaly describing Code's call of October 2, 1974. Later, he was shown a copy of the telegram by someone--perhaps Atkins. Both Dr. Strouth and Code agreed that a Mr. Sargent of the law firm of Whitman and Ransom put pressure on Hirschhorn to retract the telegram since he, Hirschhorn, did not want to be involved. Hirschhorn discussed the proposed retraction with Strouth before sending it out; and while the retraction was not sent at anyone's urging, the language was a result of conversations between himself and Sargent. It was sent with the mutual approval and consent of himself and Sargent. The retraction itself indicated that the first telegram was not entirely accurate; but it does not repudiate the use of Hirschhorn's name as author. Moreover, as Strouth conceded, although he had not been authorized to tell an untruth on behalf of Hirschhorn the first telegram did contain an inaccurate use of tense. Thus, whatever the origin of the telegram was, it appears that Hirschhorn had available a rationale for withdrawing it which could not offend either of the contending sides.

36. After Hirschhorn's retraction and Justice Kirby's ruling in favor of Strouth on the interlocutory order, the scene in Calgary quieted. Strouth thinks that the Norsul litigation (the second and unrelated Canadian proceeding) had been due to come to trial on January 15, 1975, Code does not think the case could have been tried until Strouth completed certain undertakings which he had made in pretrial proceedings. The point may be moot, inasmuch as Code applied for a Commission of Inquiry in Alberta. The Commission subsequently took evidence in New York, pursuant to Section 3102(e) of the New York Civil Practice Laws, in March, 1975, and the trial was postponed because of the instant Commission proceedings.

37. It seems Strouth does not think the Norsul case can proceed to trial in Calgary until he is vindicated in the present proceeding. Code on the other hand stated that the Norsul litigation seems dead. Whether an FCC decison would be considered relevant in Canada--and Code was of the view that it would not be--Strouth's Canadian counsel does not wish to proceed until something has first been done at the Federal Communications Commission. Strouth considers that many of these adverse consequences flow from Campbell's affidavit which implies that he lied in phoning in the telegram and which might have been brought up in Calgary if the proceeding had gone forward.

38. Strouth complained to Western Union about the disclosure and seemed at first to get a satisfactory response from Mr. Walton, a Western Union attorney. In due course, however, Strouth concluded that he was getting a run around from Western Union and thereupon complained to this Commission.

39. Walton was a Western Union attorney until June, 1975, and he directed the investigation of Dr. Strouth's complaint. He asked Gordon, identified earlier, to investigate the situation and find a contact in Calgary. Walton was excused as a witness (subject to recall) premised on the invocation by Western Union of the attorney-client privilege. Western Union subsequently reconsidered its position and waived its asserted privilege with respect to Walton. However, he was not recalled for further testimony.

40. Gordon's job includes investigative responsibilities for breaches of security with respect to telegraph communications. Walton sent Gordon a memorandum about the Strouth matter on November 14, 1974; the memorandum was received in Gordon's office on November 18, 1974; he actually read the memorandum and attached file on either the 27th or 28th of November, 1974. The first thing that Gordon did was to seek a conference with Walton--this conference was held on December 10, 1974. At that meeting, it was agreed that the first priority was to investigate in Calgary to determine whether there might be an "excuse"--e.g., pursuant to legal process--which might justify the disclosure. The next priority would be to try to determine what had happened in the New York City area where the disclosure had apparently taken place.

41. The following day, December 11, 1974, Gordon called Campbell and talked to him for 10 to 15 minutes about the details of his contact with Atkins. Gordon did notkeep any notes about the conversation but he did ask Campbell to submit a signed statement giving full details of all contacts that he had with Atkins. This statement was suplied to Gordon on December 12, 1974,

and he could recall no differences between it and his conversation with Campbell. Gordon did not speak to Campbell again after he submitted his statement.

42. On December 11, 1974, Gordon also called Mr. Joe Graziano, Area Manager of Operations, Campbell's ultimate supervisor, and asked him to investigate what had happened and whether the source of the disclosure could be isolated. Gordon checked back with Graxiano on January 14, 1975, but nothing had been learned. Graziano made only an oral report and did not tell Gordon the extent of the investigation he had conducted. And Chestna, Campbell's immediate supervisor, related that Graziano never asked about the circumstances of the disclosure. Gordon also contacted Mr. Bud Geisler, Area Manager of Operations for the Central Telephone Bureau in Morristown, New Jersey, for investigatory help, but again he received no written report and does not know what Geisler actually did in his investigatory efforts. Geisler never asked about the circumstances of the disclosure. The eventual report given Walton was that they had been unsuccessful in identifying whoever was responsible for disclosures.

43. On December 12, 1974, Gordon called Mr. James G. Shea, an attorney in Calgary, to have him look into the court records there to see whether a court order had ever been placed for records. Shea wrote Gordon on December 19, 1974, to report that no subpoena or other court process had been issued in Calgary for the telegram.

44. Although Atkins was unknown to be the person who obtained Campbell's affidavit, Gordon never tried to talk to him. His

recollection is that the possibility came up and it was decided that either Walton or Monaghan-another Western Union attorney-would handle the interview. Whatever may have been learned, Gordon was never told the results of the interview. Indeed, until 1976 Gordon did not even acquire the obviously relevant knowledge that Atkins had obtained a file copy of the telegram rather than just a copy of the message delivered to Strouth. Gordon's explanation for this situation was that Walton was really the person in charge of the investigation and it was his business what he would tell Gordon. Also, Gordon made no effort to advise this Commission or the U.S. Attorney of a possible criminal violation on the ground Walton was really the chief investigator and in the best position to make a judgment whether there was evidence to support such a report. In this regard, Gordon could not say whether it was company policy to report possible criminal violations and that such matters were problems for the Law Department.

45. The foregoing recitation of events and acts clearly suggests that Western Union pays little more than minimal attention to its obligation to avoid unauthorized disclosure of telegraphic communications. For further example, Western Union Exhibit 1 contains Tariff Rule 24 which is a general directive to Western Union employees to maintain secrecy of telegraphic communications; however, examination of this Rule indicates that it is based on the pre-1968 text of Section 605, a fact which poses a critical question when it was last seriously addressed. Western Union Exhibit 2 has an attachment which expresses a concern with secrecy problems in its system. However, Gordon was unaware of any problem and has never investigated another unauthorized disclosure case. No person at Western Union has specific

responsibility with respect to preventing unauthorized disclosures. The principal effort which appears to be made in this regard involves the distribution of periodic reminders to employees not to disclose protected material. The investigation of Strouth's complaint seems to have had little effect on this: Indeed, Gordon did not know of any steps taken since 1974 to prevent unauthorized disclosures.

46. Both Chestna and Campbell described the actual practices which were followed at 60 Hudson Street in 1974 and which are presumably still followed. There are apparently no written standards governing disclosures, albeit employees are told of their responsibilities to maintain privacy and are instructed to ask a supervisor if they are in doubt. Similarly, there are no standards as to what persons must do to identify themselves. If a question arises, a written request might be demanded but in practice the story an inquirer or caller tells determines whether information is released. And it is permissible practice at Western Union for an employee to take a caller's word.

47. Employees are told that they can release copies of telegrams to the sender, receiver or an authorized agent, and that should a third party want information about a telegram, a subpoena would be required. But if the third party already has the text of the telegram then it would be assumed that he is entitled to it. It might then be possible for the third party to get a file copy. Once it has been decided to release a file copy, it would not be unusual or surprising for billing information to be provided as well. Moreover, after the decision to release a file copy is made, there would be no compunction by Defendant about giving it to a messenger. Similarly, although Gordon was

surprised that anyone would state information could be released on the telephone-since this would be contrary to company policy-it appears that this was the actual practice. The actual practices at Western Union are entirely consistent with Atkins' description of his first contact with Western Union. In fact, Chestna testified that if someone already had a file copy of a telegram he would have verified it rather than questioning the person's right to have the copy.

48. In addition to the general informality in deciding whether to release file copies or billing information, there is no formal procedure designed to limit access by employees to records of telegrams. Thus, Chestna could not think of anyone at 60 Hudson Street who could not obtain access to telegrams. The evidence seems clear that under existing procedures employees could obtain and release information improperly and no one would be the wiser. From the evidence it is not too much to suggest that such general laxity in in-house discipline on non-disclosure at Western Union has not had greater trouble than it would appear. Campbell provided an answer to the state of affairs when in connection with a related question he explained that a telegram can not be retrieved without the telephone number it was called in from, the date, and the filing time. This specific information would rarely be available to parties seeking unauthorized disclosures.

49. On the last day of the hearing Western Union proposed to call a rebuttal witness to testify further with regard to Western Union's policies and procedures under Section 605, and the Common Carrier Bureau agreed that it would be "quite desirable" for Western Union to bring

in such a witness since besides the Bureau's position, Western Union's general procedures are highly pertinent to the issues in this proceeding. Subsequently, without explanation on the record, Western Union elected not to call such a witness.

50. Now the findings made to this point no doubt reflect in large measure the proposed findings of the Common Carrier Bureau, in the Defendant's view-a kind of ally to the Plaintiff. While the evidence fully supports those findings, they of course in a case of these dimensions and novelty (in administrative jurisprudence), are not the totality of possible record findings. Principally, because a disposition at this level is not the last word; both for a necessary recognition of the true worth of the Defendant's proposals and a fuller appreciation of the variety of nuances, factual and legal, for possible appellate consideration, other findings to lend more clarity to the complex picture of the immediate contest also can be an aid to the reviewer, perhaps, the reader, in arriving at a fair and just disposition, as well as a better understanding of the scope of the issues.

51. Unlike the Common Carrier Bureau and the Plaintiff, Western Union would have, (again unlike the Bureau which blithely, so says the Defendant, chooses to ignore grave imperfections of the character of Strouth, the Complainant)-Strouth as a pure pretender to the title "Doctor" bestowed by a hardly more than ephemeral institute of higher learing-indeed, nowhere to be found-a kind of colossal "name-dropper" as an intime of pinces, potentates and Popes, all of whose pretensions are the self-serving and self-enunciated titles and accomplishments rendered, (presumably for a fee), in the publication "Who's Who in Canada"; and

worse, one who has perpetrated or intended to perpetrate a gross fraud on a Court of record in our sister country Canada by asserting a deceitful and misleading version of a telegram made under his own hand in the name of another without express permission. Whatever the value of these deprecations and that value need not be be assessed or addressed, under our system of civil law, a just cause springs from the truth of facts and circumstancw proved not the trappings, real or fanciful, of a person. It can be found though, with sufficient accuracy and persuasion, as urged by the Defendant, that the subsequent telegram by Strouth's attorney and friend, Hirschhorn, did not "satisfy" or ratify Strouth's usurping authority to use Hirschhorn's name in the telegram in issue (nor in truth, as found earlier, did it abandon or disclaim it as a fraudulent instrument). Defendant would have the placing or filing of the telegram-in-issue with a sworn affidavit before the Canadian Court labelled as an act of "fraudulent intent." Since that sister forum did not dispose of the merits of the matter before it, premised on the affidavit and telegram in question, and this forum neither desiring nor pretending to second-guess what that forum might ultimately concluded were it so faced, that characterization by the Defendant can be hardly more than a suppositious allegation; and the extra-record urgings of the Defendant attempting to disparage or demean Complainant further by alluding to his name-changes, including recent efforts at self-endowment of a title of nobility are simply that; extra-record, without evidential efficacy.

52. Though it is ancient practice and procedure in trial evidence to attempt to assail the character of a party or witness in litigation in order to diminish, discredit or impeach the efficacy of one's testimony, particularly the

trait of a witness or party always in issue, his veracity; and save as an exception to the rule excluding character evidence in civil cases, unless inherently in issue, to affect the measure of damages; (Cf. Trial Evidence, Chamberlayne 2d Ed. Section 608 (1936)), however, telling that onslaught it has hardly dispositive value so long as-as here- the character of a contesting party is not a designated issue in that contest. What Defendant really seems to be saying is principally, if not exclusively, it must be found that Strouth by his unauthorized, perhaps, in Defendant's view, devious, act of placing before the Canadian Court the contents of his telegram and having properly filed it, that act and that act alone made it a public disclosure for all the world to see and to know. Hence, on that ground, at least, Defendant urges it is without fault and innocent of any wrongdoing.

53. That thesis is hard to come by and accept as a finding, absolute and binding to its very core, even though a brother Barrister and Solicitor of the Canadian Bar, appearing as a Defendant's witness (certainly not as an expert or one otherwise learned in the Law of Canada), affirmed that filing, qua filing is a total public disclosure. Whatever the impact of that supposed "disclosure" in Canada, this Commission itself was not disposed to accept the full thrust of that thesis, to wit, that a customer's divulgence of the text of a telegram to a third party constitutes implied consent to a carrier's divulgence of such a message (Order, supra, paragraph 10). On the other hand, since a fair resolution of a legal contest must be founded on human reason and experience, the thesis of "disclosure in Canada" will receive its proper consideration in the disposition hereinafter in the overall considerations. This is not to say that Section 605 of the Communications Act, as

amended, can be ignored in the further dimensions of the case at bar, i.e., disclosure or release of telegraph company billing records.

Ultimate Findings and Conclusions

54. It is not too much to say that the case at bar presents wholly novel problems when mirrored against the customary day-to-day public duties and concerns of a Federal Regulatory Agency such as this. Indeed, from the events discussed in the designation Order, Howard Steven Strouth v. The Western Union Telegraph Company, 59 FCC 2d 850 (1976), which were more fully brought to light in the evidence of record, whether new thresholds are to be mounted or whether having an apparent case of first impression foreordains the necessity of that mounting, are themselves questions of no mean calibre. This precatory note is prompted not by the issues to be tried (which) are relatively familiar and not too abstruse) but by the legal theories or theses propounded by the Plaintiff/Complainant which urge or suppose a variety of Common Law wrongs and proposed remedies as inhering in the evidence addressed during trial under these issues:

> "(1) whether Western Union has violated Section 605 of the Communications Act; and
>
> (2) what damages, if any, should be awarded to Strouth for any violation found under issue (1)."

55. Some of the wrongs asserted by Complainant because of "breach of warranty under contract... [are] negligence, gross negligence, negligent misrepresentation and a further breach of a fudiciary relationship

created by statutes of the United States, both civil and criminal ..." (Complainant's Proposed Findings at page 4). Additionally, it would appear that Complainant urges "that defendant's negligence resulted in damage to Complainant's reputation, since damage is traditionally viewed as adjunct to libel and slander... [and that] the disclosure [by Western Union] was a libel and probably libel per se because it also was a violation of the criminal law" (18 U.S.C. Section 2511) (Complainant's Proposed Conclusions of Law, page 75).

56. Whatever the heady variety of propounded civil wrongs (or in the idiom of lawyers), torts, possibly ex contractu, the evidence of record under the given issues must demonstrate wrongful conduct by the Defendant Western Union or its agents or employees; and that as a proximate cause or nearest consequence of that conduct, i.e., a violation or violations of Section 605 of the Communications Act of 1934, as amended-a recognizable injury at law befell the Complainant. That having once found the presence of the civil wrong or tort, its measure of injury to the Complainant must, of necessity, be determined not only by apposite traditional legal theory and precedent but, in this forum, equally by the metes and bounds of the jurisdictional mandate reposing in the parental or enabling legislative authority, the Communications Act of 1934. That this is so flows from the natural application of human reason and experience, while embracing and recognizing, as urged by the Complainant and at times by the Common Carrier Bureau, "the plain meaning rule" of legislative construction; that the forum of contest not only must know and apply its mandated duty but also must fervently eschew exceeding its bounds. This stance neither employs a retreat from judicial innovation or

activism nor, equally crass, chooses the supposedly safer route of timidity. For a given task must always to succeed be within the capacity, real or probable, of the task-doer. This, of course, is not intended to be a premature forecast of the result here but simply the touchstone upon which to reach a fair and just disposition.

57. The evidence clearly sustains the notion that neither Strouth nor Hirschhorn ever expressly consented to the divulgence of either the telegram or the related billing information. That Strouth and not Hirschhorn was the author or sender of the telegram and that Strouth sent the telegram in Hirschhorn's name apparently without explicity authorizaiton are equally clear factual events. Also, the text of the telegram was supplied by Strouth in an affidavit which was entered in a court file in Calgary, Canada on September 30, 1974, which filing would appear to be available for public inspection at least in that sister country and could not have been withdrawn since that date.

58. On October 2, 1974, an individual who was not able to be identified, but nevertheless a Western Union employee, furnished a file copy containing both the text of the telegram and the associated billing information to lawyer Atkins after Atkins requested it and demonstrated that he possessed the text of the telegram. The file copy was released without authorization or consent of Strouth or Hirschhorn. What is of great import, to re-emphasize, under the issues is that the decision to release the file copy appears to be in conformity with Western Union practices.

59. It may be further concluded that on October 2, 1974, Atkins took the file copy of the telegram to a Western Union employee who

explained that symbols Atkins did not understand and indicated that the telegram had been routed through Morristown, New Jersey. The Western Union employee did not consult any records in supplying this information and had no knowledge that Atkins' possession of the file copy was open to question. Atkins prepared an affidavit which contained his understanding of the coding on the file copy of the telegram. On October 3, 1974, he took the draft affidavit to Western Union's offices at 60 Hudson Street with the object of finding someone who could verify it for him. The affidavit had the file copy of the telegram attached. Campbell, Manager of Customer Services, verified the telephone number of the Hilton Inn but did not consult Western Union records to verify any other part of the affidavit; nonetheless, Campbell signed it. In essential part, the affidavit confirmed that the wire was phoned in from the Hilton Inn; that it was charged to Strouth's New York office phone and that the individual calling in the telegram gave his name as Bernard Hirschhorn. The critical events took place between October 2 and October 4, 1974.

60. The three events which raise the issue of violation of Section 605, clearly sustain the following conclusions:

(a) On October 2, 1974, Mr. Atkins telephoned Western Union and asked an employee to supply him with a file copy of the telegram. Despite the fact that neither Hirschhorn nor Strouth had consented to release of the telegram, and that Atkins had no authorization to obtain it; the employee confirmed the existence of the telegram (which contained both the text of the original telegram and billing information not contained in

it as sent and not otherwise available) to Atkins. With this conduct, simply in confirming the existence of the telegram and next in furnishing the file copy, Western Union violated Section 605 of the Act, (59 FCC 2d 850, 855; see also, United States v. Baxter, 492 F.2d 150, 167-68 (9th Cir. 1973), cert. denied, 414 U.S. 801 (1973)). Strouth's revelation of the telegram in the Calgary proceeding did not derogate from the facts of violation; for while it may be conceded that a public court record of the telegram was made in litigation (resolved without its use) it severely strains reason to suggest that that filing gave automatic license to Defendant to divulge or disclose to the world.

(b) Later on October 2, 1974, Atkins went to a Western Union employee and sought an explanation for certain symbols on the file-copy. The Western Union employee did not consult any records, did not have knowledge that Atkins' possession of the file copy was open to question under Section 605. This inheres in the earlier violation and exacerbates it as a separate violation in a continuing mode of Defendant's conduct.

(c) On October 3, 1974, Atkins took a draft affidavit (to which the file copy of the telegram was attached) to Western Union's offices at 60 Hudson Street in an effort to find someone who could certify to its accuracy. Atkins was referred to Campbell, Manager of Customer Services. Again, Mr. Atkins had no authoriza-

tion to be in possession of the file copy, neither Strouth nor Hirschhorn having consented to its use. Campbell presumably concluded that he did and thereupon verified the accuracy of a telephone number (that of the Hilton Inn) referred to in the affidavit, but did not consult Western Union's records to verify any other part of the affidavit. Thereafter, he attested to the accuracy of the affidavit before a notary. Both by certifying the affidavit and by agreeing to the attachment of the file copy to it, Campbell, however mistaken, engaged in conduct which led to a separate violation of Section 605. While Mr. Campbell was a person with authority to certify to the accuracy of the file copy, as noted earlier, there is a certain ambivalence in the record as to whose version of the Campbell/Atkins encounter is more accurate and presuasive. Campbell was at first certain Atkins had identified himself as Strouth's attorney, thereby justifying disclosure under Section 605, i.e., to a sender's attorney. Campbell later was not quite certain of this. Atkins denied that he presented himself as Strouth's attorney but that he did identify himself as an attorney. Atkins' testimony denies Campbell's first version, e.g.,

"Q. Did you tell him (Campbell) your relationship with the person of Dr. Strouth?
A. What relationship is that?

Q. That of an adversary?
A. Yes. Clearly he understood that this was for the opposing side, but also that the telegram had been appended as an exhibit to an affidavit that Dr. Strouth had submitted." (Tr. 361).

61. It is to be again remembered that Campbell testified under a grant of immunity from prosecution (having feared the possible consequences of his role in the disclosure of the telegram). That immunization, while in no way granting license to testify falsely, nevertheless, provided Campbell with less tense and more relaxed circumstances in his description of the event in which he was a principal actor. But whatever the apparent conflict in the versions of the Campbell/Atkins encounter, Campbell on behalf of his principal (master) Western Union did very little more than proceed under a misconception, perhaps presumption, that he was dealing with an agent or attorney of the sender of the telegram. A far worse picture would be that of Atkins having clearly identified himself as hostile to and an adversary of the sender Strouth and Campbell acting as he did. On either score, be it Defendant's employee's neglect or carelessness in not better assuring himself of with whom he was dealing or, far graver, ignoring the clear signal of danger of unlawful disclosure where a stranger hostile to Strouth was present, to proceed as he did, Defendant, through the agency of Campbell, without question, engaged in a violation of Section 605 of the Communications Act.

62. At this juncture and as gleaned from this record, a further word, or more, needs be set out on the nature, effect, policy and practice of Defendant Western Union in the matter of guarding the secrecy or confidentiality

of messages and other information of public customers who pay to use its facilities. The Common Carrier Bureau, as indeed the Complainant, comes down hard on the superficiality (if not slovenliness) of in-house discipline of Western Union in this area of vital public concern. The Common Carrier Bureau also with reason even conjures that Western Union's not having had "more trouble than it has with unauthorized disclosures is purely fortuitous."

63. What then is the nature of Defendant's policy o protect the sanctity of the service it renders to public customers. It produced at trial, apparently bearing a 1970 date "Notice to All Employees and Telegraph Agencies [subtitled] Tariff Book Rule 24." Briefly, and to place in sharper focus earlier findings, this Notice recites an outdated version of Section 605 of the Communications Act, a statement that such Section 605 also applies to "intrastate traffic", some eight "Company Rules and Regulations" and Telephone Handling, all of which caution employees to be ever alert to their grave responsibilities to insure the safeguarding of the secrecy of telegraph communications. From the incidents in this record, the effect or effectuation of that policy is hardly discernible. Atkins, for example, whether he identified himself as an attorney or not or whether he was or was not the attorney of Stroth, simply by telephoning and reading a version of a telegram he had received from Code in Canada was able to gain additional information of a limited nature from a Western Union employee (of unknown precise identity). Indeed, testimonial evidence of a Western Union employee, who was Manager, Operations Planning and Support, at the time in question reads "If information is going to be given out over the telephone, the employee who is giving out the information would take the calling party

at his word, as to who he was. It is possible if he was not going to give it out over the telephone he would request, "you know, writing, if it was a business on the letterhead or something to that effect." (Tr. 416).

"Q. Were there standards as to how a person was to identify himself as one of the people qualified to receive the telegram?
A. No." (Tr. 423).
"Q. During the period in the latter part of 1974, how much training, to your knowledge, was Western Union giving individual employees with respect to the privacy provisions of Section 605?
A. In general, they were handed a copy of it and, you know, told to read it and if they had any questions to ask a supervisor.
Q. So there were no lectures as such.
A. No.
Q. Were the supervisors getting training?
A. No more than the other employees.
Q. They were simply receiving written memoranda?
A. Correct." (Tr. 427).

In a word, the whole thrust of this testimonial evidence pictures Defendant's management as well as Defendant's employees as relying on paper policy, perfunctory memoranda, communications and press releases with little follow through to assure at least a semblance of discipline and control over the subject matter of statutoily proscribed divulgence or disclosure of interstate or foreign communications by wire or radio.

64. Again, it is not too severe to repeat and to note, as Complainant has urged, that Defendant living and prospering in the privileged luxury of monopoly enterprise has at best, under the evidence, been found grossly wanting in the performance of its grave statutory duty, which demands, because of its privileged public franchise, at least the exercise of reasonable and prudent care in the execution of its public duties. Indeed, as the Bureau pointedly notes, when afforded the opportunity to explain, defend or rebut the clear implication of its imperfections as a duty-bound guardian of the secrecy of its communications business, Defendant Western Union, at first, hesitated in its opportunity then finally declined to do so.

65. That the evidence in this case discloses the policy and practices of Defendant Western Union in the protection of the inviolability of communications over its facilities, their content and meaning as required by Section 605, as, superficial, indeed little more than gesturing is beyond question; the more accurate term is, wretched; thus it would behoove the Defendant as a corporate enterprise, if it has not already done so, to institute forthwith in-house measures looking towards much more meaningful monitoring of its grave duties in dealing with and servicing the paying public. More on this later.

The Violations

66. To crystallize the aforesaid, it is found and concluded that Defendant Western Union is a common carrier within the meaning of Section 3(h) of the Communications Act of 1934, as amended, hence, among other responsibilities, would be liable for negligence in the performance of its public duties (Primrose v. Western Union Tel. Co., 154 U.S. 1). Under

the evidence it can be and is further found and concluded that at least three cognizable unauthorized disclosures of communications comprehended under Section 605 of the Communications Act took place premised on the negligent conduct of Defendant or its employees, (47 U. S. C. Section 217 to wit;

(1) Subsequent to September 23, 1974, and prior to October 2, 1974, an unidentified employee of Western Union acknowledged by telephone to one Atkins the existence of the telegram of principal concern here and that Defendant or its employee agreed to and did furnish Atkins with a file copy of the telegram together with billing information.

(2) Atkins visited a second Western Union office, where another Western Union employee, again unidentified, confirmed an interpretation of the coding contained on the telegram.

(3) Defendant's employee Campbell's certification by affidavit of the accuracy of the information on the file copy of the telegram Atkins had acquired from another of Defendant's employees.

67. These disclosures not only amounted to clear violations of Section 605 of the Communications Act but equally contravened Western Union's own Tariff Book Rule 24. Western Union's affirmative defenses claiming "prior disclosure and publication" of the telegram in question by Strouth's filing of an affidavit in a Canadian Court; that Section 605 does not apply to its employees not engaged in the transmission of the communication; and because Strouth made improper use of its facilities (presumably using another's name as sender) thus Western Union

should not be subjected to liability on the thesis of "honest mistakes" made by its employees are defenses contrary to the evidence, not to speak of the rule of law. For it is little more than a thin thesis to urge that because Defendant's employees (who were intimately involved here in the unauthorized disclosures) were lower level managerial, perhaps clerical administrative personnel, not technically, physically and mechanically part of the electronic transmissions, by wire or radio, they are, thus, beyond the reach of those persons contemplated within Section 605. One might have hoped that the Defendant as a mature corporate enterprise of some standing in the national, perhaps international, business community would have had second-thoughts on such an argument, if that it be. Each of Defendant's former employees having been produced as witnesses in this proceeding were, by any reasonable measure, engaged in the chain of events of the everyday services provided at a price by Western Union to the public; hence their duties, unlike, for example, the more remote chores of janitorial or commissary personnel, were clearly assisting in receiving, transmitting, or assisting in transmitting the communications services provided by Western Union. And need it be added that Section 217 of the Communications Act provides that a carrier shall be liable for the acts or omissions of its officers, agents or employees as if they were the acts of the carrier itself. And as Complainant observes, quite accurately, "it is a matter of simple logic and common sense to conclude that if employees of Western Union made disclosures prohibited by Section 605, then those illegal acts are the acts of Western Union and that Western Union has thereby violated the Act." (Reply Findings, page 16).

68. To spend more time in rejecting that defense of Western Union would simply be a

wasteful and unnecessary exercise. Let it be then noted that the Defendant's cited precedent U.S. v. Baxter, 492 F.2d 150 (9th Cir. 1973) and Bubis v. U.S., 374 F.2d 643 (9th Cir. 1967), in support are clearly distinguishable with the case at bar, if not wholly inapposite. The cited precedent of Complainant--Reitmeister v. Reitmeister, 162 F.2d 691 (2nd Cir. 1947), U.S. v. Polokoff, 112 F.2d 888, 889 (2nd Cir. 1940), Cert. den., 311 U.S. (1940), U.S. v. Finn, 502 F.2d 938 and Nardone v. U.S., 302 U.S. 379 (1937), and the argument of the Common Carrier Bureau (Bureau Reply Brief at page 7, et. seq.) are more persuasive of the notion, particularly if one reads Western Union's own internal rule, Tariff Rule 24, which applies to "all employees", that Defendant's "Employee" argument is totally without merit.

69. Next, Defendant's defense premised on Stroud's "improper use" of its facilities as supplying underpinning to Defendant's employees' "honest mistake" greatly begs the question and is vastly off the target. For as the Bureau notes "there has been no showing that the disclosures at issue resulted from 'honest mistake' and Western Union has not proposed such a conclusion in its proposed findings of fact." (Reply Brief, page 8). Indeed, the Bureau in a moment of attractive levity observes on this defense "if some rule 'white heart but empty head' were adopted it might provide an inducement to carriers to slacken their supervision of Section 605 matters-hardly a desirable result." Amen.

70. The heart of the problem cannot be "honest mistake" prompted, so it goes, by Stroud's usurping the name of Hirschhorn as sender of the telegram, even though that act may have been used improperly in Calgary, Canada. Rather, it was the sorry state of

Western Union's paper policy affecting the subject matter of unauthorized disclosure of communications sent over its facilities and the amorphous execution of that policy in its in-house operations that discloses a pitiful lack of harmony in effecting a sensible discipline in protecting the secrecy of information within its enterpreneurial responsibility.

71. Now, were it to be argued--which Defendant has not--that the principal tortfeasors or wrongdoers whose conduct caused Western Union to dislodge the unauthorized information were two lawyers, one a Barrister in Canada, the other a licensed American practitioner, that may have a ring of plausibility to it. That is, were one to assume that less than sufficient identification of person and purpose occurred via the telephone by Atkins and in the face to face confrontation of Messrs. Campbell and Atkins. The evidence does not clearly permit a handy resolution of the Atkins/Campbell versions of events. Atkins affirmatively suggests he made full disclosure of who he was, what he was about and what interests he represented. Campbell was not so sure.

72. But Defendant did not choose this route. Rather, Defendant's principal theory has been, with the active aid of Code and Atkins, that full public disclosure of the telegram's content was effected by the filing with the Court in Calgary. Indeed, Barrister Code at one point charged Strouth with committing fraud on that Court, (a matter really of no overwhelming concern here) but which prompted Strouth to rebut, in some detail, by disquisition on the nature and elements of what constitutes a legal fraud. A discourse well on point.

73. Whether the filing with the Canadian Court amounted to knowledge to the whole world

is at least questionable; and whether that is a principle of common or statutory law of Cananda has not been fully addressed and disposed of in the evidence. No doubt our sister country Canada follows to some extent the English Common Law while we in the country follow or apply where necessary the common law of the forum. Cf. Hazen v. Mathews, 184 Mass. 388, 68 N.E. 838 (1903); Spencer v. Bush, 50 Misc. (N.Y.) 284 (1906); White v. Richeson, (Tex. Civ. App.) 94 S.W. 202 (1906). In any event, the existence of foreign law is a question of fact (Banque de France v. Chase National Bank, 60 F.2d 703 (1932)). Though Defendant's sponsoring of Barrister Code's testimony may have elicited his view that the filing with the Court in Calgary is tantamount to public disclosure of the contents of the telegram, he was not sponsored either as an expert or scholar, (though he may very well be) but as an active participant in the event at trial; and that is his exclusive role.

74. But this seems also besides the point. First, the affidavit and telegram filing were not dispositive considerations of the Court in Calgary in dismissing its injunction affecting Strouth. Indeed, it would appear that the Court there premised its action on wholly separate grounds. The principal ingredient, alluded to in the original Designation Order and echoed by the Common Carrier Bureau, is that "divulgence within the meaning of Section 605 has been defined as the transmitting of a message to a third person without the consent of the sender, U.S. v. Gruber, 123 F.2d 307, 309 (2d Cir. 1941)"(Order, FCC 76-500, supra, page 7). And Western Union has not claimed to have had the direct consent of either Strouth or Hirschhorn. A fortiori as the Commission further observed "the mere possession of a copy of a telegram by a third party, in and of itself without a more convincing manifestation of intent, certainly does not indicate

either express or implied consent of the sender to its divulgence by a carrier." (Id). To the contrary, the evidence of record plainly demonstrates that Strouth intended no such thing. What is rather certain is that Strouth (and not without common human reaction) having been greatly distressed, indeed angered, by Norsul's gaining a temporary legal advantage over him by being able to block the disbursement of a rather considerable sum of money due him, (in the neighborhood of one hundred thousand dollars) set in motion every means at his disposal and in his mind to counter attack and defeat what he considered a foul blow.

75. Without more and for emphasis' sake, Defendant Western Union, under the evidence, has violated Section 605 of the Communications Act on three separate accounts or occasions: (1) divulgence by an unidentified Western Union employee over the telephone to attorney Atkins and giving a file copy of the telegram to him; (2) the explanation of the symbols on the telegram to Atkins by another Western Union employee; and (3) the executing of an affidavit by a Western Union employee with the attached file copy of the telegram.

The Theory and the Measure of Damages

76. Of principal concern here in addressing the theory and the measure of damages are Section 206, 207 and 209 of the Communications Act of 1934, as amended.
Section 206 reads:

> "In case any common carrier shall do, or cause or permit to be done, any act, matter or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in the Act

> required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of the damages sustained in consequence of any such violation of the provisions of the Act, together with a reasonable counsel or attorney's fee, to be fixed by the court, in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case." (Emphasis added).

Section 207 reads:

> "Any person claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission, as hereinafter provided for, or may bring suit for recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both remedies." (Emphasis added).

Section 209 reads:

> "If after hearing on a complaint, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act, the Commission shall make an order directing the carrier[2] to pay to the complainant the sum to which he is entitled on or before a day named."

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[2] Section 217 of the Act provides:

> "In construing and enforcing the provisions of this Act, the act, omission, or failure

Strouth, of course, has elected under Section 207 to proceed with his claim in this forum. Strouth on the strength of the evidence of record claims he has been damaged as the result of Defendant's violations of Section 605 as follows:[3]

Loss of reputation	$ 1,000,000.00
Project Rheintechnik -	
salary	50,000.00
profits	40,000.00
Project Coal Liquification - salary	50,000.00
profits	60,000.00
Legal fees in Calgary from disclosure	9,537.65
Travel expenses to prosecute this case	6,500.00
Legal fees in this case paid to date	75,000.00

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[2] Continued

of any officer, agent or other person acting for or employed by any common carrier or user, acting within the scope of his employment, shall, in every case, be also deemed to be the act, omission, or failure of such carrier or user as well as that of the person."

[3] In his Reply Proposed Findings of Fact and Conclusions of Law, Strouth, unlike or in addition to his affirmative claims of damage at trial, premised on net income of the Defendant for the years 1974 and 1975 as well as its corporate net worth of 1975, suggests "that this is an appropriate case for the imposition of punitive damages in the amount of at least $10 million." This is a vast sum by any account.

Strouth time lost in connection with Calgary case because of divulgences	4,500.00
Strouth time lost in connection with FCC because of divulgences	3,800.00
TOTAL	$ 1,299,337.65

77. Because of the admixture of the Complainant's various theses of his affirmative case, e.g., ex contractu by reason of the contract between Complainant and Defendant for communications services, or civil wrong (tort) premised on varying degrees of negligence, gross negligence, libel, libel per se, injury to reputation, etc., and because the Commission on its disposition of the interlocutory appeal respecting the subject of "punitive damages", (FCC 77-609, released September 2, 1977), it seems appropriate, if not imperative, to gaze into a mirror, as it were, to see what we are, as an administrative regulatory agency under the mandate of the Communications Act and what we are about.

78. Whether the thesis of Strouth's action in this forum is ex contractu or tort or both, seems of little moment, for it would require no great effort of mind were damages, compensatory (actual) or other to be discerned in the evidence, the separation or examination of the various legal elements constituting the harm, injury or wrong may fairly result in the same disposition. Save for some cases, generally damages ex contractu are limited to actual or compensatory damages (Western Union Telegraph Co. v. Emerson, 69 So. 335, 14 Ala. App. 24); cert den., (69 So. 1017); but this is State court action and antecedent to the Communications Act of 1934 (thus, this agency) by more than fifteen years. But, the nature and extent of damages, if any, in the case at bar will be addressed later.

79. To confront and, perhaps, grapple with the questions of what this as an administrative agency, particularly an administrative regulatory agency endowed with a variety of powers, including administrative adjudication, is and what its mandated mission is, it seems reasonable to address its origins as evidenced in the minds of the Congress, its creator. Actually, both Complainant and Defendant have addressed those subjects in their various proposals for disposition. This is a necessary prerequisite, to this mind, to fathom the full reach of the theory and measure of damages and is fully in harmony with the Commission's direction in the aforesaid Memorandum Opinion and Order, "to determine whether the evidence warrants the imposition of punitive damages if it should later be concluded the provisions of the Communications Act permit the award of such damages." (Order, page 3). As alluded to earlier, this cause having pronounced attributes of first impression would presuppose the need for the widest latitude of analysis both for the sake of the parties at bar as well as appellate bodies. Unless it is misconceived, it seems fair to assume that the aforesaid direction is intended to aid in the formulation of prospective disposition on review or appeal at some later date. Fortifying this notion is the fact that this case is not one where the trier-of-fact has simply to certify the record to the agency for its decision.

80. This agency has its origins and derives from "the commerce clause" of the Federal Constitution, thus is not, whatever its judicial or quasi-judicial funcions, an Article III body where 'the Judicial Power of the United States" is "vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish" (Art. III, Section 1 U.S. Constitution), (Cf. McGuire v. Amrein, 101 F. Supp. 414). On the other hand,

the "court" comprehended in Section 206 and the "district court of the United States" in Section 207 of the Communications Act are, without doubt, Congressionally ordained and established bodies under Article III of the Constitution, endowed with the full range of Judicial Power vested in them. And it would also seem to follow that as creatures of the "commerce clause" administrative regulatory agencies, though endowed with varying amounts of judicial power are not "courts" but more arms of the legislature.[4]

81. The questions may quickly arise. Is the attempt at distinction between "court" and "administrative regulatory agency" meant to provide a tenuous foundation for disparate remedies reposing in Sections 206 and 207 of the Communications Act? Isn't the simple answer that in affording the remedies in a choice of forums, the Congress, mindful of the inconvenience of prospective complainants having to travel great

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[4] See, Davis, Administrative Law (1951):

> "Administrative law is the law concerning the powers and procedures of administrative agencies. An administrative agency is an organ of government, other than a court, and other than a legislature, which affects the rights of private parties through either adjudication or rulemaking" (at 1). (Emphasis added).

And though this may seem a sterile exercise in semantics, the Supreme Court has held the Tax Court of the United States (under its former title Board of Tax Appeals) "not a court [but] an executive or administrative board." (Davis, Id.), Old Colony Trus v. Commissioner, 279 U.S. 716, 725; Dobson v. Commissioner, 320 U.S. 489, 495 (1945)).

distances to the seat of the Commission in Washington, D.C., they would be spared that burden by having available the many district courts of the United States and that the remedies would be identically applied? And would not the latter honor "the plain meaning rule" of legislative construction and intent? The "plain meaning" of Section 206 simply gives to an injured person "the full amount of damages sustained" and that form of damage must of necessity be entertained and resolved by this Commission. The element of convenience seems of minimal persuasive value when it recognized that, where appropriate, field hearings throughout continental United States, Hawaii, Alaska, Puerto Rico and other United States Territories and Possessions are fairly common in this agency and such activity from its inception and its required annual reports is obviously within the knowledge of the Congress. Hence, the question of the "plain meaning" rule on this score largely falters. While this form of question and answer may be the rapid road to self delusion, it, at least, suffices to offer some recognition to those at bar who espouse the virtues of the "plain meaning rule" to those statutory matters affecting the case at bar. This observation, of course, does not end the dilemma, or supposedly so, of "court" versus "administrative agency." The rule of law as reflected in apposite and binding case law to be treated hereinafter should provide the solution to the suggested dilemma.

82. Whatever the suggested distinctions and prerogatives of a "court" and an administrative regulatory agency in providing remedies founded in contract or tort and, notwithstanding the statutory language of Sections 206 and 207 of the Act, in addition to compensatory, we are enjoined to determine under the evidence whether that evidence would permit the awarding of exemplary (punitive) damages.

83. In that quest, and to narrow that which could become overly distended, the subject of "damages" at least as they would apply here ought to be defined and examined. "Compensatory damages are such as will compensate the injured party for the injury sustained and nothing more; such as will simply make good or replace the loss caused by the wrong or injury" (Blacks Law Dictionary, Revised 4th Ed., page 467 (1968)); "Exemplary damages" or "Punitive Damages" "are damages on an increased scale, awarded to the plaintiff over and above what will barely compensate him for his property loss, where the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud or wanton and wicked conduct on the part of the defendant and are intended to solace the plaintiff for mental anguish, laceration of his feelings, shame, degradation or other aggravation of the original wrong, or else to punish the defendant for his evil behavior or to make an example of him for which reason they are called "punitve' ...." (Ibid.; citations omitted).

84. As noted earlier, Defendant Western Union though by virtue of the Communications Act as a common carrier is liable for negligence in the performance of its public duties, it is not, otherwise liable as an insurer. Primrose v. Western Union Telegraph Co., 154 U.S. 1. Thus, were the theory here based principally on contract--which it seems not--"under any contract to transmit a message by telegraph, as under any other contract, the damages for a breach must be limited to those which may be fairly considered as arising according to the usual course of things from the breach of the very contract in question, or which both parties must reasonably have understood and contemplated when making the contract, as likely to result from its breach." (Ibid., page 29). That case

was pursued by plaintiff's theory of "negligent mistake" and was resolved and decided by the Court based on the written stipulation on Defendant's blank form which limited its liability to the amount for the sending of the telegram; a sum granted by the Circuit Court of $1.15 instead of of the claimed $20,000 or more.

85. Of interest to the case at bar is that the Court in Primrose, supra, stated: "Telegraph companies resemble railroad companies and other common carriers, in that they are instruments of commerce; and in that they exercise a public employment, and are therefore bound to serve all customers alike, without discrimination. They have, doubtless a duty to the public, to receive, to the extent of their capacity, all messages clearly and intelligibly written [the message in Primrose was in cipher and wholly unintelligible] and to transmit them upon reasonable terms. [And surprisingly, this case, however, of decisional vintage, was decided decades before the Communications Act of 1934.] But they are not common carriers; their duties are different and are performed in different ways; and they are not subject to the same liabilities" (Primrose at 14). (Emphasis added). That is, they are not insurers as the common law carriers, e.g., railroads and innkeepers.

86. The above discussion is simply intended to emphasize that which may be all too obvious to the learned; Defendant Western Union, while common-carrier like and so termed under the Communications Act may well be faulted for and liable for acts of negligence; whatever its liability, it is not of that degree for "loss or injury by any cause whatever" (Primrose at 14), a kind of "absolute liability", a term employed, perhaps artfullly, by the Common Carrier Bureau in the present case. it may be, as

Complainant urges, that Section 605 of the Act "supplants" or reaffirms the common law and establishes "strict" liability upon Defendant Western Union, but the precedential fact still persists, Defendant is but "common-carrier like", liable for wrongs committed, certainly; not, as with "insurers" "absolutely liable," in the sense of being harnessed with the yoke of the highest plateau of the traditional concept of "care."

87. Complainant Strouth here clothes his affirmative case in his proposed findings, conclusions and reply brief in a virtual host of civil wrongs or torts, negligence, gross negligence, negligent misrepresentation, breach of fiduciary relationship created by statute, both civil and criminal, not to speak of breach of warranty under contract.

88. At this point it may prove helpful--perhaps a tedium--in reaching an earlier and to this case, were the Complainant's position on several aspects of the evidence put in focus, addressed and disposed of. For example, Strouth leans heavily on his own testimony and that of an "expert" on his behalf, one Spohler. Thus, Complainant Strouth contends that when answers to interrogatories, pursued in pre-trial Discovery, are introduced by an adverse party they become substantial evidence and, here, Western Union not having rebutted same, is thereby bound. Citing Manquel v. Prudential Lines, Inc., 53 F.R.D. 301, 303 (E.D. Fa. 1971) and Safeway Trials (sic) Inc. v. Smith, 222 Md. 206, 159 A. 2nd 823, 828 (1960). In Safeway Trails, under the State of Maryland Rules, the Court did say that "the interrogatories and answers were offered and admitted in evidence and, under Maryland Rules 417(f) and 413(a)(2) as the answers of the adverse party, became substantive evidence," but the Court also added "sworn,

although not conclusive, admissions of fact" (Safeway Trails at 827, 828). In Manguel the Court observed: "Answers to Interrogatories are admissible in evidence subject to the restrictions of Rule 33 of the Federal Rules of Civil Procedure that they 'may be used to the extent permitted by the rules of evidence.' " Then alluding to McCormick, Law of Evidence, Chapter 27, Section 242 (1954) the Court simply noted and decided that "an evidentiary admission requested by an adverse party" is admissible. Hence, these rules support the notion of admissibility not whether such evidence is conclusory. The conclusory nature of such evidence depends on what remains following cross-examination, disposition of objection and re-direct examination. And the record of this proceeding discloses extensive cross-examination in this very area (e.g., Tr. 1137, et seq.).

89. Also, to place in proper focus the testimonial evidence of Strouth's "expert" witness. His expertise would be exclusively that of an executive in firms dealing in the marketing, purchase and sale of securities, stocks and bonds and related activities. In his own words "as a broker and an advisor" who for approximately twenty years did business with Strouth. Cumulatively ... in the millions." Thus, following voir dire he was qualified as a skilled or expert witness "in the areas of investment banking, venture capital... and matters dealing with securities in general." (Tr. 973). Spohler was never given sufficient financial data by Strouth to evaluate the financial aspects of Strouth's projects of some concern in the evidence relating to damages; nor did Spohler ever arrange a financing for these projects. Evidentially, then Spohler's "expertise" is extremely limited, peripheral, in the main, to the subject of the measure of damages related to Strouth's two projects described in the record. Whatever other evidential weight or value to his

tesimony will, of course, be encompassed in the disposition to be made later herein.

90. Now having found and concluded three separate offenses under or violations of Section 605 of the Act, before addressing the residual or proximate effects of these violations respecting the person of Strouth, a further caveat in these considerations is in order. Since there has been throughout this proceeding the unequivocal fact that Strouth through his Canadian attorney Duncan caused the filing of the telegram in question before the Court there in Calgary, albeit that that filing was not a dispositive element of the Court's dismissal of an injunction, and albeit that Strouth argues vainly and, on unconvincing grounds, that the telegram as filed was not before the Court hence not divulged by the filing, it seems fair to state and conclude that as to that act of filing there was a voluntary publishing and divulgence of the telegram by the sender to that court. To say otherwise does unacceptable violence to reason, a kind of sleight-of-hand, it was filed but really was not. This of course, does not provide the saving premise for divulging by Western Union to third parties, especially to the depth and detail of billing and other information, whatever the rule of law or practice in Canada as to the public nature of a filed legal pleading.

91. Because the decisions of local or state law widely diverge, in assessing a claim for damages, such as here, what law governs? "Since Congress has occupied the entire field pertaining to interstate telegraphicmessages [as here] it has become settled in most jurisdictions that the damages recoverable for breach with respect to an interstate message are to be determined according to the federal law." (86 C.J.S. Section 200, citing Western Union Telegraph Co. v. Aldridge, 66 F.2d 26). Aldridge

is bottomed on Lake Shore and Michigan v. Prentice, 147 U.S. 101, both cases being heavily accented and concerned with the notion of the awarding of "punitive damages" a subject to be addressed later herein. Nevertheless, on the narrow proposition of ascertaining, actual or compensatory damages, Aldridge and Lake Shore hold that "A principal ... [is] liable to make compensation for injuries done by his agent within the scope of his employment ... ." (Aldridge at 28).

92. Concerning interstate messages, Aldridge holds that the "federal rule" would be applied in fixing the measure of damages citing both Western Union Telegraph Co. v. Speight, 254 U.S. 17 and Southern Express Co. v. Byers, 240 U.S. 612. In Southern Express, the Supreme Court noted: "... under settled doctrine established by our former opinions [concerning interstate commerce] rights and liabilities in connection therewith depend upon acts of Congress, ... and common law principles accepted and enforced by the Federal courts." (Southern Express at 614).

93. Putting momentarily to the side Strouth's claim for "Loss of Reputation, $1,000,000.00 for later consideration, we may now consider those claims for actual or compensatory damages seriatim:

(a)	Project Rheintechnik (the trout "farming" project)	$50,000 for loss of 2 years salary
		$40,000 for lost "profits"

(b)	Prjoect Coal Liqui fication Project (conversion of coal to liquid and other fuels)	$50,000 for loss of salary $60,000 for lost "profits"
(c)	Legal Fees in Calagary from disclosure	$ 9,537.65
(d)	Travel Expenses to prosecute this case	$ 6,500.00
(e)	Legal fees in this case paid to date	$75,000.00
(f)	Strouth time lost in connection with Calgary case because of divulgences	$ 4,500.00
(g)	Strouth lost time in connection with FCC case because of divulgences	$ 3,800.00

94. Neither the Project Rheintechnik nor Project Coal liquification has ever been inaugurated, indeed both are "dormant." The only evidence presented concerning the Liquification of coal, was the testimony of Strouth. While Strouth claimed to have had a number of documents corrobative of his testimony, he failed to produce same. And his cost projections were derived from discussions with representatives of two companies, none of whom were called to testify. Even conceding some value to Strouth's testimonial description of what he had in mind in conceptualizing the liquification of coal, an uncommon proposed enterprise when compared with his prior business, he was quite unclear and uncertain concerning the processes to be used, indeed not an expert in the field, nor did he know the number of employees to be used on the project nor when it would have commenced operation, although he did

suggest that an initial capital investment of $500,000 and a later invetment of $5,000,000 would be required.

95. Besides the wholly amorphous nature of the constitutent elements of the planned projects and enterprises, as Defendant notes, the coal liquification project was hardly more than an idea, conceptualized, but never acted upon. And it is no defense, indeed the notion is rejected as being contrary to the rule of law and the law of evidence, that because Strouth's testimony went largely unrebutted on this and other projects his "unrebutted" evidence must be accepted as proof. (Cf. Wigmore on Evidence, Volume IX (3rd ed. 1940), Section 2498, pp. 334-335; Section 2034, page 260), "the mere assertion of any witness does not of itself need to be believed, even though he is unimpeached; because to require such belief would be to give quantitative and impersonal measure to testimony." (Emphasis in the original). And to lend ear (but not mind) to Complainant thesis that this legal doctrine is dogma unless the unimpeached testimony is "inherently unbelievable," the simple but accurate answer premised on "reliable probative and substantive evidence" (Administrative Procedure Act (APA) Section 556(d)) is that the tangible reality, as revealed in the evidence, of the coal liquification project as being in esse, much less whose start-up was imminent, is "inherently unbelievable." Were one to add the further requirement that the injury, wrong or violation must be the causative requirement that the injury, wrong or violation must be the cauative factor, proximate and nearest to the damage claimed, reason compels the further conclusion that none of the three violations of Section 605, found earlier, have in the evidence the remotest causal connection with the dormancy, if that indeed is its state, of the coal liquification project. They (the violations) might have prompted anger,

discomfiture and self-conscious embarrassment but the halting or downfall of an otherwise interesting but uninitiated concept, hardly. For no one, no one but Strouth, and no supportive convincing instrument of evidence encourages and buttresses that novel thesis. While there may be more to be addressed, the record is clear and convincing and thus it may be concluded that there CAN BE NO AWARD of damages, either on the theory of "salary" or "lost profits" under the coal liquification project.

96. Much the same can be said under the evidence relating to the Rheintechnik or tout-farming project. Again it is founded exclusively on Strouth's testimony and a letter from the German company, Rheintechnik which proposed to sell Strouth equipment to use in his trout farm. For example, Strouth did not know when the trout project would have commenced operation and that the work on the project had not reached the point of refining figures and drawing up contracts and that marketing analysis were preliminary but that, by his own estimate, the project would have required $100,000 initial investment, a $300,000 second phase investment and would have employed a dozen people. While the fact that "trout farming" would be a new interest of Strouth, he being more "a mining executive" is not in any way disabling, his projections were based on the estimates of others not otherwise available for corroboration or cross-examination.

97. Further, the evidence under the "trout farming" project discloses that Strouth would not be its technical manager, he having no competence in the field, and that the Rheintechnik company's letter relating to the matter was simply an excerpt from a series of correspondence and estimates while the remaining documentation was not offered in evidence. Though that

letter contains price quotations for the equipment and estimates of associated operating expenses, the basis for the operating expenses was not supplied. Also, the letter was one of a series of letters on subjects which Strouth was "not at liberty to provide." Moreover, there were no agreements between Strouth and his putative associates in this project concerning salary nor any documentation showing what financial figures he suggested to these associates but that Strouth likely would receive no salary at all, rather a deferred $25,000 annual salary and the possibility of a 40% share.

98. Again, the foundation on persuasive evidential grounds suggesting that the "trout farming" project (while no doubt an interesting idea prospectively) was a serious likelihood as to its being set in motion, eludes a rational grasp. Here, too, the underpinnins of demonstrable damages whether one uses the term of Complainant "venture profits" or the term of defendant project "earnings", are nowhere to be found and the degree of certainty needed to make a fair and reasonable approximation of damages suffered is equally beyond the pale of reason. But more, as in the case of the coal liquification project, even on extreme hypothetical grounds were real or actual damages discernible they would not have derived proximately from the wrongs already found against the perpetrator Western Union. For the aborting by Strouth of the projects, were they ever real, that is in esse, under the evidence cannot be laid to Defendant's acts of wrongdoing in respect of Section 605. To repeat, no one has come to the aid of Strouth to lend substance as to the causal factor of their abandonment, temporary or permanent. Spohler a friendly witness and long-time broker friend and investment counselor for Strouth merely speculated that the Canadian litigation would make difficult the task of raising money for

Strouth's project. Surely his testimony is not supportive nor corroborative of Strouth's thesis that the Western Union disclosures or divulgences produced or procimately caused the supposed damages suffered. At best, Spohler's testimony merely is indicative of Strouth's rather extensive purchases and transactions in the securities markets.

99. It seems of some significance to recall that during the trial of this proceeding, if not prior to its initiation by Strouth's Complaint to the Commission, his interests were not monetary; rather that he sought "vindication" against those whom he felt had dealt unfairly with him. It would also appear that there were several persons invovled in the litigaiton in Canada who he claimed had used the telegram and information related thereto to disparage his person and his interests. And, here, seems to be the cardinal insight into the whole substance of Strouth's position throughout this proceeding.

100. Those adversaries of Strouth in Canada, be it those before the Court in Calgary in different and apparently suspended litigation or others, no doubt, having come into lawful possession of the telegram by either being served in the course of the Calgary litigation or as a result of its filing before that Court and having learned, however improperly, of the full import of the telegram set about to use it in whatever way they might. And it does not beg the question to state that while the telegram, as disclosed in Calgary by service or by filing may have provided the occassion for the hot pursuit of its full import by Messrs. Code and Atkins, that disclosure (voluntarily proffered by Strouth himself) is, in no event, the cause of the residual effects complained of by Strouth. Were the facts proven that the findings of Messrs. Code and Atkins resulting from their joint efforts to seek out and gain the

full details of the telegram from Defendant's employees the foundation for Strouth's discomfiture, anger and embarrassment and the suggested blackening of his good name and reputation, their actions then would seem to be the prime and proximate cause of his claimed undoing; not the conduct of Defendant, through the agency of its employees, however inept. What efforts and their full extent Messrs. Code and Atkins pursued in Canada or elsewhere with the full information about the telegram in hand and in what manner and degree those actions affected the person of Strouth are not discernible in the evidence, save for the expressed feelings by Strouth that he was being demeaned and degraded in the community of his peers and associates by Western Union's acts of divulgence to these lawyers.

101. Again, why Western Union chose to follow the path it did in this proceeding by soliciting the succor of Messres. Code and Atkins, in its affirmative defense is, of course, Western Union's to decide. Perhaps, it panicked, if that human attribute can be ascribed to a corporate person. In any event, at least at the outset in response to Strouth's original Complaint, a prompt and sincere letter of apology by Western Union, for example, stating that its employees misconceived or were not fully informed about the person Atkins, his mission and purpose, would probably have cleaned the slate. But in customary hindsight, lamentably, that did not occur. Hence, this seeming epic at hand.

102. Passing over other sanctions reposing in Section 605, at times urged by Complainant, as a suppositious premise, the principal moving forces, wrongdoers or joint tortfeasors, those who having gained (whether by assumed right or possible guise) the total ramification of the telegram and the identity of its

sender Strouth, those persons, it would appear, especially the American lawyer Atkins, would be more likely to be the principal wrongdoers for infractions derivatively premised on Section 605; first, in the absence of a valid subpoena or other lawful authority, e.g., Court Order, Atkins came into possession of transmitted interstate communications and related information not lawfully his to have via the telephone, by his messenger and as part of the affidavit he prepared for Campbell and by his passing along that material and information to his associate Canadian barrister Code. In like manner, Mr. Code.

103. A troublesome element in the evidence seems to remain (a matter alluded to earlier). In the previous paragraph there is reference by way of qualification to "assumed right or possible guise" in the conduct of lawyer Atkins on the three separate occassions which provide the evidential grounds for the three Section 605 violations found hereinabove. First as acknowledged by Western Union, their former employee Campbell the so-called "star witness" for Strouth was a "credible witness." Indeed he was, in spite of having been granted immunity under the Fifth Amendment. Though Atkins seemed quite certain that he fully disclosed his identity and purpose as representing interests adversary to Strouth, on the other hand, Campbell an otherwise intelligent and forthright person was not so certain. Although diminished in certainty later, at one point Campbell was convinced that Atkins identified himself as Strouth's attorney, thus in Campbell's mind one permitted under Section 605 and Western Union's own Tariff Rule, to have the full purport of the telegram divulged.

104. The "presumption of veracity indulged an opposing lawyer witness solely because he happens to be a layer", (Faulkner Radio, Inc. v. F.C.C., --App. D.C. --, Case

#75, 1378, May 26, 1977, Sl. Op. page 16) is a clearly erroneous rule of evidence; that principal is, of course, applied here. Thus, the veracity of a lawyer witness is to be treated and considered no more or no less than any other witness; on the other hand, a lawyer in dealing with a layman is charged with the highest degree of candor, yes even to the point of being exact and precise and being certain that a layman fully understands and comprehends what the lawyer intends and is about to pursue. Indeed, nothing short of full and unequivocal disclosure of intended act and purpose is mandatory in the calling of lawyers especially in dealing with laypersons. This would be particularly so in the matter of drawing affidavits and other documents (Cf. Canons of Professional Ethics, 22, Rev. 4th Ed., Blacks Law Dictionary, p. XV (1968)).

105. All this is not to suggest or imply that Atkins in any manner indulged in deceit or exceeded the bounds of professional conduct or was other than forthright with Campbell. Yet and in spite of the apparent superficiality of execution and monitoring of Western Union's policy and practice in safeguarding secrecy of an interstate communication entrusted to it, as disclosed by the evidence in this case, Campbell besides being a believable witness is an otherwise alert and intelligent person who apparently fulfilled his not insignificant duties as Manager, Customer Service Department, to the complete satisfaction of his employer Western Union where he had been employed from 1961 to 1976.

106. One of the more difficult duties of one sitting as judge in proceedings in administrative jurisprudence is the combining of the functions of judge and those customarily reserved for a jury. Thus, he who presides not only applies and interprets the law or policy but is also the trier-of-fact and the facts concerning the Campbell/

Atkins encounter, as noted, are at least troublesome to determine. It would not be unfair nor unjust to conclude as a minimum that both parties were acting under misconception--Campbell thinking Atkins represented Strouth and Atkins thinking Campbell fully understood his identity and purpose as hostile to strouth. Herein,. may be the fragility of Western Union's in-house discipline respecting secrecy and Campbell's role as acted may be the premise for Defendant's urging "honest mistake."

107. Yet a doubt persists. As a licensed practicing attorney representing interests adversary to Strouth should not Atkins have, as a prefactory matter, in his dealing with Campbell and the others disclosed not only his adversary identity with the greatest precision but also how he came to be in possession of the contents of the telegram and what was to be the precise and intended use of the requested affidavit. Indeed, at one point in explaining his conception of Campbell's role Atkins observed "some people are unduly impressed by the fact of one's being an attorney." The evidence would not permit the conclusion that Atkins went to those precise lengths. Why Western Union did not press this notion rather than its affirmative defenses of voluntary public disclosure and others is, to say the least, puzzling. But, again, that is the exclusive province of Defendant to decide.

108. The next element of claimed damage is the sum purportedly expended by Strouth in litigation in Canada prompted, he says, by Western Union's divulgences--the sum of $9,537.65 legal fees in Calgary, the bulk of which is represented as having been paid. At times the evidence would suggest equivocation on the part of Defendant that those claimed damages have an aura of legitimacy "at most" says the Defendant "Strouth would be entitled to recover

$3,100 in Canadian attorney's fees." While Defendant is free to choose what it will, the evidence at bar discloses that Strouth was engaged in active but unrelated litigation there in Calgary and presumably had engaged Duncan as his attorney in efforts to dislodge a restraining order or injunction on an award he had gained. The telegram in question, though filed in the Calgary court, did not enter into the disposition of the Court favorable to Strouth. Hence, what Duncan performed beyond his representation concerned with lifting of the injunction is not fully discernible in the evidence nor is there discernible a causal connection between the divulgences via telephone, messenger and affidavit in New York by Western Union and the legal fees paid or to be paid by Strouth to Duncan.

109. Further, no matter the various breakouts or breakdowns of the $9,537.65 sum by Defendant in its proposed findings and the apparent concession respecting $3,100 in Canadian attorney's fees, the evidence at hand would support the additional factual finding that a Canadian generated Commission of Inquiry (a kind of reciprocal extra-territorial Discovery proceeding) was convened in New York City during March 13, 1975--March 16, 1975, where a principal subject matter was the full import of Strouth's telegram. For legal expenses connected with that Inquiry Strouth claims $2,537.65, a part of the $9,537.65 amount. Now, it was observed earlier that Defendant Western Union seems to differentiate a position of these particular claims for damages by imprinting a certainty validity to their assertion. What prompts this Western Union approach is not easily understood.

110. Though consistency is neither virtuous nor the highest form of reasoning, unless the evidence of record is misconceived here, the Commission of Inquiry which took place in New

York City under compatible and mutually favorable legal procedure and practice inter se the State of New York and the Country of Canada, took place certainly under the color of lawful authority even though its object apparently was in pursuit of litigation then pending between Strouth and Norsul; and which event was much later than the dismissal of the restraining order Strouth sought to have dislodged in formulating and sending his telegram employing as sender the name of his friend and attorney Hirschhorn. It is said by Code that that litigation is now "dead" and by Strouth, deferred or in limbo. Nevertheless, Strouth was actively engaged in litigating his case against Norsul and presumably under the Commission of Inquiry's mandate was obliged to appear and testify before that Commission in the prosecution of his case. Surely, even to that legal expense, Strouth as client, would be otherwise responsible for the payment of attorney's fees.

111. Hence, under the evidence, Strouth's, Norsul opponent, through Barrister Code, came into possession of the telegram in question, albeit without the fuller details supplied by Western Union employees, by customary service of the affidavit accompanied by the telegram on an opponent or its having been filed with the Court in Calgary. It would be a forfeiture of reason to suggest that Code who together with Atkins and others was present during the sessions of the Commission of Inquiry would be in an unlawful possession of something which had been served in which he was actively involved. If claim for the specified damages relating to Strouth's appearance at the Inquiry is premised on how the full import of the telegram including billing information supplied by Western Union was used by Code, Atkins and other adversaries of Strouth at that Inquiry; and if Strouth continues to depict Defendant's divulgences by its participation in the Inquiry, presumably as witness, as the sine

qua non of the suggested blackening of his name and other wrongs he claims to have suffered, that is an abysmal thicket into which no sane person should venture. For if Defendant's participation in that Inquiry, voluntarily or by compulsion, aided in the ordinary objects of Discovery Procedure under the color of lawful authority, the Strouth telegram as originally sent, filed or served was properly before the Court which authorized the Commission of Inquiry and whether the divulgences were compounded by Strouth's adversaries, is that thicket which will be shunned. Defendant's presence at the Inquiry seems perfectly legitimate and the whole cat being out of the bag, so to speak, how Code, Atkins and other Strouth legal adversaries in the Canadian lawsuit chose to act would be their peril to chance; not the Defendant here. Thus, the pleaded damages for legal costs bottomed on Stroth's having to appear and defend at the Inquiry CANNOT BE AWARDED.

112. The several subdivisions of Strouth's other claims for damages, Travel Expenses to prosecute this case--$6,500; Legal Fees in this case paid to date --$75,000; Strouth's time lost in connection with Calgary case because of divulgences--$4,500; and Strouth time lost in connection with FCC Case--$3,800, may now be addressed.

113. At one point during the trial of this case, the parties were invited to file briefs on "attorney's fees and litigation expenses" (Tr. 797). First to be noted is that both the Complainant and the Common Carrier Bureau took positions reflecting the notion "Rightfully, Complainant notes that our problem is not concerned with awarding of attorney's fees...a non-common law element of damages reserved for court actions ..." (Memorandum Opinion and Order, FCC 76M-1453, released November 9, 1976). Indeed,

at a pre-trial conference where the ruling was made that the Presiding Judge had no authority to award attorney's fees, Complainant's counsel had explicitly stated "... my client cannot get from this agency an award of damages for his legal expenses in prosecuting his case before this agency." (Tr. 78).

114. Strouth in company with the Bureau now appears to have a change of mind and position. Principally, Strouth and the Bureau urge, on reflection and re-evaluation of their former positions that by analysis of the statutory authority reposing in 47 U.S.C. Chapter 5, Sections 206, 207, 208 and 209, and employeing "the well recognized rule of statutory construction that interrelated sections are to be construed as a whole...the congressional mandate for an award of attorney's fees as a part of costs and 'damages' is explicit." (Complainant's Brief, March 28, 1977). Conceding that this case is primarily one of first impression, Strouth contends that case precedent, e.g., Meeker v. Lehigh Valley R.R. Co., 236 U.S. 412 (1915) antedated the provisions of the Act here concerned (1934) which Act "in our modern day system of due process imparted to this and presumably other agencies the character of an administrative court, part of the overall judicial system in the United States. Then proceeding to fashion his argument by analogizing agency statutory authority and mandate with the regular judiciary and Congressional intent as clearly authorizing assessment of "costs and attorney's fees," and setting out the prerogatives of the office of Administrative Law Judge both as to law and equity, Strouth finally argues that "it is not clear" that the power to assess such "damages" extends to this agency or its Administrative Law Judges. Should it develope, Strouth adds, that he is to be denied attorney's fees, the public interest will not be served" and avoid that calamity, that "it should be incumbent on

the Commission to advise any private litigant who complains of any carrier violation that the only adequate remedy is to file suit in the District Court" (Complainant Brief, supra). And ending its argument on a most novel note, Complainant, citing a Decision of the Comptroller General--File No. B-92288 (1976)--that, should he prevail, he is entitled to an award of attorney's fees and costs but should such an award be deemed unauthorized, then an award should be given him "from the Commission's appropriated funds" else, those like himself who bear heavy legal expenses are, in effect, without adequate remedy solely because of his choice of forum.

115. This is an impressive argument and were the reason and logic as pronounced as Strouth would have them, his position would have more than a persuasive ring. But Complainant's reason and logic on further analysis greatly falter. First analogizing, as he does, the regular judiciary and administrative adjudication, though there be great similarities there are just as many, perhaps greater, dissimilarities. Under the Administrative Procedure Act (APA), supra, unlike the Federal, regular judiciary, most, if not all, proceedings before an Administrative Law Judge are always subject to de novo review by his agency. That review comprehends both findings of fact and conclusions of law. Indeed, the agency itself when imposing a monetary forfeiture and seeking to recover is subject to Section 504 of the Act: "(a) The forfeitures provided for in this Act... should be recoverable in a civil suit in the name of the United States brought in the district court where the person or carrier has its principal operating office.... Provided, That any suit for recovery of a forfeiture imposed pursuant to the provision of this Act shall be a trial de novo...." (Emphasis added). Thus, Congressional intent is unequivocally evident that though judicial or quasi-

judicial functions; i.e., the steps of due process leading to imposition of sanction, it is to be the regular judiciary, that is the Constitution Article III Judiciary that is to oversee the application of due process by agencies within the prerogatives or mandate of enabling legislation. This, of course, is the limitation or dimension of a Federal District court. As mentioned on another occasion in this case, be it the plain meaning rule of statutory construction or other modes of discerning Congressional intent, the act embracing the full range of this agency's mission, albeit that range greatly endowed with statutory given discretion, is replete with specificity of monetary amounts that may be imposed on violators of its provisions (Cf. Memorandum Opinion and Order, FCC 76M-1453, released November 9, 1976, paragraph 19 (not necessarily recognized as universal doctrine but as example)). These seem further in dicators of Congress having fully in mind the distinction between the authority and mandate of an administrative adjudicatory body and a regular United States district court, e.g., as to administrative bodies on fines and forfeitures, fixed amounts and their recoupment or recovery by trial de novo in a district court.

116. And speaking further of statutory construction and Congressional intent, under Section 414 of the Act it is provided: "Nothing in this Act contained shall in any way abridge or alter the remedies existing at common law or by statute, but the provisions of this Act are in addition to such remedies." Is not the clear meaning of this provision that the remedies provided in this Act speak only for themselves, are not common law remedies which otherwise separately persist, and are particular remedies, not identical, with or in substitution of common law, but in increase of those otherwise available under the American system? Hence, it seems abundantly certain,

contrary to the argument of Complainant, who here is pursuing a variety of theses grunded in common law tort, that not only is there a readily discernible distinction between the adjudicatory role of an agency with that of a regular district courts but more, that having a choice of forums, which Complainant refuses to distinguish as to power in granting remedy, he has or has had available the full range of common law remedy in a forum other than this fully endowed with that power or authority. Surely, Complainant is not proposing that an adminstrative regulatory body besides and in addition to its regulatory functions also carries with it the broad cloak of a common law court. Should that be the proposition; it is rejected as a virtual perversion of reason. Witness avowed uncertainty of Complainant's thesis that if attorney's fees and costs are otherwise unauthorized under the purport of the Act, then, apparently under some otherwise socially attractive and compassionate ground, the Commission should award out of its appropriated funds the, no doubt, great expense of his pursuing the instant contest. The regular judiciary and particularly the district courts of the United States customarily by statutory permit, levy and assess fees and costs. It is here that the erstwhile impressive argument of the Complainant totters, perhaps collapses.

117. Next, the thesis of the Common Carrier Bureau respecting the element of damages, assuming the rule of law and case precedent would prevent the embracing of Complainant's theories of damages; that "policy" considerations might justify an award of attorney's fees and, presumably related costs of litigation. As Defendant effectively argues "...policy judgments such as that advanced by the Bureau are reserved in the instance to Congress" (Defendant's Brief, March 28, 1977, at page 9). That is the simple and complete answer to the proposition of "good

policy" to abate present and future incursions of the Act by common carriers. But there is a greater reason and if one can suffer the imprecation of the Roman tongue, an otherwise precise imitation of the Greek, a tongue reputedly having a word where none seemed at hand, the role of a judge, whatever the expanse or modesty of his forum should ever be under the precept; jus dicere, et non just dare, that is a judge is to speak or interpret the law, not to make or give it; much less make policy. And a policy without foundation in the law, implicitly or explicityl, such as here, is without efficacy, hence, unenforceable.

118. And the apparent position of the Bureau that on "policy grounds", a kind of compassion be meted out to Stroth for his legal costs, while admirable, is otherwise unavailing even to an equally compassionate forum, under the rule of law (Meeker v. Lehigh Valley R.R. Co., 238 U.S., at 432-433):

> "In our opinion the services for which an attorney is to be taxed and collected are those incident to the action in which the recovery is had, and not those before the Commission [ICC]. This is not only implied in the words of the two provisions just quoted [Sections 8 and 16], but is suggested by the absence of any reference to proceedings anterior to the action. And that nothing more is intended becomes plain when we consider another provision in [Section] 16 which requires the Commission, upon awarding damages, to make an order directing the carrier to pay the sum awarded 'on or before a day named' and then declares that, if the carrier does not comply with the order within the time limit the client may proceed to collect the damages by suit. The

> Commission is not to allow a fee, but only to find the amount of the damages and fix a time for payment [Cf. Section 209 of the Act]; and if the carrier pays the award within the time named, no right to an attorney's fee arises. It is only when the damages are recovered by suit that a fee is to be allowed.... The evident purpose is to charge the carrier with the costs and expenses entailed by a failure to pay without suit..." (Emphasis added).

119. Premised on the foregoing, it would appear that this proceeding is intended solely to arrive at an order either directing the Defendant to pay damages or absolving the Defendant from liability. It would then not be a suit in a District Court contemplated to collect an award of damages following a Commission Order. Indeed, the notion is fortified that the damages comprehended in Section 206 of the Act would be only those damages suffered or sustained by the Complainant as the proximate result of Defendant's conduct. But a mandate is at hand to find whether the evidence would support damages beyond those customarily termed compensatory or actual damages.

120. To respond to that mandate, a fair summation of the evidence would, as earlier found, portray the public duty of the Defendant not as an insurer imposed with the common law carrier's burden of exercising the highest degree of care in its dealings with customers; rather here Defendant's responsibility, albeit a grave public duty is the exercise only of that degree of prudent conduct which would spell out ordinary care. Hence, while the evidence of record discloses that, because of Defendant's poorly enunciated, poorly monitored and poorly executed in-house discipline in safeguarding the secrecy of

interstate communication entrusted to it, three separate and distinct violations of Section 605 took place; but that not only were these violations free of any proximate taint in causing the Complainant claimed damages and, however unwisely Defendant might have chosen to pursue its theory of the case, whatever the degree of its negiligence it cannot be found to be of that tenor or conduct "wantonly or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligation ...." Lake Shore and M.S. Ry Co. v. Prentice, 147 U.S. 101, 107 (1893).

121. Though under Section 217 of the Act Defendant is, without doubt, liable for the acts of Campbell and the others who clearly were acting within the scope of their employment, these Defendant's agents operating under an amorphus policy and practice themselves cannot be said to have acted out of malice; thus, even had Defendant authorized or ratified[5] their acts--which Defendant did not--since there was no malicious conduct on the part of its

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[5] Ratification is "the adoption of affirmance by a person of a prior act which did not bind him, but which was done or professed to be done on his account, thus giving effect to the act as to some or all persons, as if originally authorized" 3 Am. Jur. 2d Agency Section 160. Defendant Western Union by its acts before or after agents conduct evince no intention to ratify. Nor the fact that Defendant placed Campbell and others in charge of business, absent a basis for suspicion, or its refusal to discharge them serve as ratification. Williams v. Pullman's Palace Car. Co., 3 So. 631 (Sup. Ct. La. 1888). (Recognized and accepted as sound legal princple, albeit State law.)

agents (who were neither unfit for their duties nor was it demonstrated that Defendant was reckless in employing them) no such malice can be attributed to their principal, Western Union. In sum, the critical elements necessary to an award of exemplary or punitive damages are lacking in the evidence at bar. Hence, nowhere in the evidence can it be found that the premise has been established to warrant the imposition of punitive damages against Defendant Western Union, AND IT IS SO CONCLUDED; (Cf. U.S. Steel Corporation v. Fuhrman, 407 F.2d 1143, 1148 (6th Cir. 1969), cert. den., 398 U.S. 958; Fred B. Black, Jr. v. Sheraton Corporation of America, (D.C. Cir. 75-2034, August 22, 1977, slip op. page 11); See also, Williams v. City of New York, 508 F.2d 356, 360-1 (2d Cir. 1974); Walker v. Huddleston, 261 S.W. 2d 502, 507 (1953)(malicious conduct--a showing required either defendant intended a wrongful act and knew it to be wrongful when done--(not at all present here)); National Casket Co. v. Power, 125 S.W. 279, 282 (Ct. app. Ky 1910)(a mere failure by defendant to comply with rules, regulations or statutes is not malicious conduct); Texas Pac. Coal and Oil Co. v. Robertson, 79 S.W. 830, 832 (Sup. Ct. Texas 1935)(failure to think of a possible result of act, not malicious conduct and cannot justify imposition of punitive damages); Worden v. Tri-State Insurance Company, 347 F.2d 336, 343 (10th Cir. 1965)(entire want of care so as to have been conscious, but indifferent, that defendant's act put plaintiff in imminent danger--(not in the evidence here)); Wood v. Mississippi Power Company, 146 So. 2d 546 (Sup. Ct. Miss. 1962)(wrongful act done in good faith is not malicious conduct).

122. Likewise, claimed damages for "loss of time" by Complainant under his various pursuits and "costs" connected with the prosecution

of his case, however onerous, cannot, under the rule of law, be recompensed. As discussed in Meeker, supra, and a whole line of cases in the Interstate Commerce Commission as well as this agency support this disposition. Peller v. P.R.R. Co., 40 ICC 84, 86 (1916); Botsford v. P.R.R. Co., 19 ICC 469; 472; Redwood County Oil Co. v. Chicago N.W. Ry. Co., 195 ICC 529, 533 (1933) and among others, Industrial Commission v. New Jersey and New York R. Co., 324 ICC 272, 273 n. 1. (1965); WSAZ, Inc. v. A.T.&T., 31 FCC 175, 194 (1961); Thorsell Barnes Co. et al., 1 FCC 2d 1247, 1318 (1964), citing Meeker, supra, and on review 1 FCC 2d at 1275: "...we do believe the expenses incurred by a reasonable and prudent potential litigation in acquiring proof of claim constitutes consequential damages. Finally, it follows that in the absence of proof of actual damages, a claim for consequential damages is untenable." This form of damages not being recognized at common law is grounded in statutory invention and the statutory basis in this Act and elsewhere in case law is totally wanting. Hence, an award of attorney's fees and the suggested consequential costs underlying Complainant's claims CANNOT BE AWARDED; AND IT IS SO CONCLUDED.

123. In summary, then, Complainant Strouth in company with the Common Carrier Bureau under the evidence has demonstrated satisfactorily actionable breaches of duty with respect to unauthorized divulgences by Defendant Western Union of the content, meaning and related information of his telegram, on three occassions, but has failed to show actual recoverable damages as the consequence of these breaches of duty; that is, whatever the degree and extent of damages claimed, the unauthorized divulgences were not the proximate cause--iniuria sine damno (breach of legal right or duty

with no proximately caused actual damages). In the absence of showing actual recoverable damages, the only sums recoverable would be nominal damages (Dawling v. Western Union Telegraph Co. (92 F.2d 864); cert. den., 303 U.S. 650).

124. The damages claimed and asserted by Strouth relating ot his proclaimed aborted projects, as discussed in depth earlier, are at best highly speculative, more ideas of plans in futuro and the damages premised on those projects are not such as would follow as a legal certainty from the negligent acts of Defendant. While these projects, as recited in the evidence, are most interesting and attractive as ideas fully suited to an expansive and inventive mind, such as Strouth's, they fall far shy of being beyond the early stage of cogitation, thus whose actuality barely reaches probability. As the Court in Dawling observed: "The Courts have held strictly to the rule that the mere probability that a certain event would have happened upon which a claim of damages is predicted, will not support such a claim nor furnish the foundation for an action for such damages" (at 865).

125. Damages claimed for loss of reputation are equally inscrutable; for there is nothing in the evidence to support that claim, save Strouth's own assessment that the demeaning of his name has been triggered by the negligent, he says malicious, acts of the Defendant. No one has come forth to buttress that suggested degrading of reputation. Indeed, under the rule of law, reputation is the "consideration or estimation in which a person...is held by the community or the public generally" Hopkins v. Tate, 255 Pa. 56, 90 A. 210 (1916). As far as this record discloses, whatever the excellence of the Strouth character--"character being what a man is and

reputation is what he is supposed to be. . . ." (Id. at 99) -- and, in spite of the strange, perhaps mischievous, act of Strouth's sending a telegram, probably unauthorized, in the name of another (and this act as a human act may have been a human imperfection provoked by his Canadian adversaries), and should he seek "vindication", whatever the degree of excellence of his reputation prior to and during this case, that reputation would persist AND IT IS SO CONCLUDED. But damages in that realm predicated on the Defendant's conduct cannot be sustained. Thus, the claim in this respect for One Million Dollars ($1,000,000.00) has been considered and weighed in the evidence; that claim too is totally without foundation and merit.

126. Having and concluded that a full and fair consideration and review of all decisional evidence permits nothing more than an award of nominal damages to Complainant, there remains something further to note from that evidence. This decision, of course, does not and could pretend to make a full measurement of the otherwise vast operations in the public community of Defendant Western Union. Whatever excellence or other attribute it possesses as a commercial entrepreneur would be a subject of no moment here. Yet, (and this bears repetition) in the evidence of this case in the vitally grave matter of insuring the secrecy of communications entrusted to it, Defendant appears sadly lacking. That Defendant living in the favored luxury of monopoly enterprise was wanting in expected diligence in its privileged state of public service is eminently apparent. And the limp defense of its actions, suggesting as Defendant does, "that the efforts of Western Union's management to implement Section 605 have been entirely reasonable", simply cannot stand under the evidence. And linking the testimony of a Chairman of the Commission and the Commission itself to

the notion "that very little attention" has been paid to Section 605 in recent years simply compounds the imperfections in in-house discipline of the Defendant and sorely begs the question. To echo and confirm the misgivings of the Common Carrier Bureau on this state of affairs, one can only speculate on the good fortunes of the Defendant in that more problems and cases in this area have not heretofore surfaced. And while the issues in this proceeding do not comprehend the imposition of a fine or forfeiture for what might otherwise be public wrongs, it would, to repeat, behoove Defendant Western Union to get quickly about the business of getting its house in order as to those matters patently disclosed in this evidence. Certainly, it should by now have abated or abandoned the practice of divulging interstate communications over the telephone on the notion of the persuasiveness of a caller's "story".

127. For the three separate and distinct, unauthorized disclosures by Defendant Western Union to wit:

(1) Disclosure over the telephone by unidentified employee of Defendant to lawyer Atkins confirming the existence of the telegram and supplying Atkins with a file copy of the telegram constituted a violation of 605, and because Complainant has failed to demonstrate actual damages flowing from that unauthorized act HE SHALL BE AWARDED BUT NOMINAL [6] DAMAGES, in the

[6] Customarily, at common law, nominal damages would be SIX CENTS; however, taking into account the realities of costs in the present day market place SIX DOLLARS would be more realistic and EIGHTEEN DOLLARS ($18.00) would probably cover the costs to Strouth for transmission of his telegram (Cf. Wilhelm v. Western Union Telegraph Co., 73 S.E. 865).

amount of SIX DOLLARS ($6.00);

(2) Disclosure by unidentified employee of Defendant to lawyer Atkins on his visit to a Western Union office in New York City confirming explaining the correctness of Atkins' interpretation of the file copy of the telegram he had earlier received constituted a separate violation of Section 605 and because Complainant has failed to demonstrate actual damages flowing from that unauthorized act HE SHALL BE AWARDED BUT NOMINAL DAMAGES in the amount of SIX DOLLARS ($6.00); and

(3) Disclosure in affidavit and attachment by Defendant's employee Campbell to lawyer Atkins of the full import and meaning of the telegram and related billing information constituted a separate violation of Section 605 and because Complainant has failed to demonstrate actual damages flowing from that unauthorized act HE SHALL BE AWARDED BUT NOMINAL DAMAGES in the amount of SIX DOLLARS ($6.00).

128. Punitve Damages suggested in the amount of TEN MILLION DOLLARS ($10,000,000.00) among other reasons set out hereinabove, since Defendant has not authorized, participated in or ratified or was otherwise negligent in employing agents of known incompetence and recklessness CANNOT BE AWARDED (Cf. Western Union Telegraph Co. v. Aldridge, supra). In Aldridge, quoting from Lake Shore and Michigan Southern Railway Co. v. Prentice, (147 U.S. 101 "it was there held that:

"A principal...though of course liable to make compensation for injuries done by his

> agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton oppressive or malicious intent on the part of the agent.... We do not see how such damages can be allowed, where the principal is prosecuted for the tortious act of his servant, unless there is proof in the cause to implicate the principal and make him particeps criminis of his agents act. No man should be punished for that of which he is not guilty.'"

Continuing, the Court in Aldridge observed:

> "It is also held in that case that the question of imposition of punitive damages is not a question of local law but of general jurisprudence, upon which the federal courts, in absence of express statute regulating the subject will exercise [their] own judgment uncontrolled by the decisions of the courts of the several states."

129. In Complainant's Supplemental Brief on the subject as to whether the "law of New York" is to be given great weight in the matter of assessing punitive damages, it suffices to note that that subject need not be reached inasmuch as the evidence in great dimension does not support the notion that Defendant acted "maliciously, wantonly or with a recklessness that betokens improper motive or vindictiveness," as set out in the cited Strouth precedent. Sanders v. Rolnick, 188 Misc. 627, 67 N.Y.S. 2d 652 (1947) aff'd, 272 App. Div. 803. Besides, we are to apply "the federal rule" on the subject, Aldridge, supra; nor does the evidence sustain the novel theory "of Defendant's admission of damages to Complainant in excess of one million dollars" (Complainant's Supplemental Brief); hence, the salient

for the legal breakthrough to award punitive damages of ten million dollars ($10,000,000.00). That theory was considred in its full, really shallow, depth and was rejected for the reasons stated.

130. And concerning interstate telegraph messages, cited earlier, Aldridge again emphasizes: "that the federal rule would be applicable in fixing the measure of damages." (Id. at 28, citing Western Union Telegraph Company v. Speight, 254 U.S. 17). In the case at Bar, there is nothing in the evidence to provide even a hint of "wanton, oppressive or malicious intent or of incompetence or recklessness" on the part of Defendant's agents, be they Campbell or unidentified others. A fortiori, the Defendant itself. Hence, under the findings, an award of punitive damages in the amount of the vast sum urged or even a lesser more modest sum, to re-affirm, CANNOT BE SUSTAINED.

131. Pursuant to Section 209 of the Act, Defendant shall pay Complainant the full amount of the aforesaid awards to wit; EIGHTEEN DOLLARS ($18.00) on or before thirty (30) days from the release of this decision; or in the likely event of review or appeal of this decision provided under Section 1.276 of the Commission's Rules, then such payment shall be made under terms set by final Order of the reviewing authority.

IT IS SO ORDERED.

James F. Tierney
Administrative Law Judge
Federal Communications Commission

Common Carrier, Complaint Against

Review Board affirms ALJ denial of damage request in the matter of a complaint against a common carrier for unlawfully divulging a copy of a telegram sent by complainant in violation of Sec. 605 of the Act. Finding that the common carrier was in violation, is affirmed. DO 20831

FCC 78R-24

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of

Howard Steven Strouth, Complainant v. The Western Union Telegraph Company, Defendant	) Docket No. 20831) File No. TS 42-75

Appearances

Walter T. Charlton, T. Paul Imse, Jr. and William Tupling, on behalf of Howard Steven Strouth, Complainant; Joel Yohalem, Peter G. Wolfe and Peter J. Monagham, on behalf of Western Union Telegraph Company, Defendant; and Jacob W. Mayer, Ella U. Owens and James O. Juntilla, on behalf of Chief, Common Carrier Bureau, Federal Communications Commission.

Decision

(Adopted: March 21, 1978;
Released: April 3, 1978)

By the Review Board: Kessler, Zias and Ohlbaum. Board Member Ohlbaum Concurring with Statement.

1. This proceeding was initiated by a complaint filed by Howard Steven Strouth (Strouth) on September 16, 1975, pursuant to Section 208 of the Communications Act of 1934, as amended, [1] directed against The Western Union Telegraph Company (Western Union). In his complaint, Strouth alleged that Western Union, in violation of Section 605 of the Act, [2] unlawfully divulged to a third person a copy of, and other information relating to, a telegram Strouth sent on September 21, 1974, and requested damages.

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[1] Section 208 authorizes "any person" to complain to the Commission "of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof. . . ."

[2] Section 605 provides in pertinent part that:

. . . no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communication centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpoena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority.

Subsequently, the complainant made his damage request more specific by claiming actual or compensatory damages totaling approximately one million dollars, punitive damages of at least ten million dollars, as well as an award of costs and counsel fees.

Background Facts

2. By a detailed Memorandum Opinion and Order (FCC 76-500), released June 9, 1976, 41 FR 24013, the Commission designated the complaint for hearing pursuant to the provisions, among others, of Sections 206, 207 and 209 [3] of the Communications Act in order to resolve

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[3] As stated by the Commission at para. 7 of its Memorandum Opinion and Order, supra, Section 206 of the Act provides that if any carrier commits an act prohibited by the Act, the carrier may be held liable for damages; and, under Section 207 "any person" claiming to be so damaged by a common carrier may either make a complaint to this Commission requesting damages or file suit in a federal district court. If a complaint is filed with the Commission, Section 209 specially authorizes it to award damages after a hearing on a complaint. Section 217 of the Act further provides that:

> In construing and enforcing the provisions of this Act, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier or user, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or user as well as that of the person.

Section 3(i) of the Act also defines "person" to include a corporation.

several factual issues, as well as the legal or policy issues set forth below. The factual issues are described at paras. 9 and 12 of the Commission's Memorandum Opinion and Order, supra, and may be briefly summarized, as follows:

(a) Whether the telegram was ever divulged by the sender, recipient, or agent prior to the acts of Western Union's employees in question, and whether the alleged filing of the telegram in the Calgary judicial proceeding actually made it a matter of public record.
(b) The nature and extent of the information which was initially given by an unidentified employee to a third person's telephone inquiry concerning the existence of the message; and
(c) Whether that employee who subsequently gave that third person a copy of Western Union's file copy of the message which included the billing data, had procured the consent of the sender to do so; and
(d) The nature of the disclosures in an affidavit signed by Western Union's Manager of Customer Services concerning the telegram, as well as whether the Manager had the consent of the sender.

The basic policy or legal issues specified are the following:

(1) Whether Western Union has violated Section 605 of the Communications Act; and
(2) What damages, if any, should be awarded to Strouth for any violation found under issue (1).

3. Prior to specification of the foregoing issues, however, the Commission in its Memorandum Opinion and Order, supra, reviewed, considered, and rejected on the basis of the

facts then before it, Western Union's contentions that, as a matter of law, its conduct in disclosing information to a third party was not illegal or unlawful under Section 605. More specifically, Western Union asserted then that (a) there was no violation of Section 605 because the full text of the telegram in question had been disclosed by the complainant prior to any action by Western Union, and therefore the complainant had consented implicitly to Western Union's subsequent acts; (b) the pertinent clause of Section 605 prohibiting the "divulgence of the existence, contents, substance, purport, effect or meaning" of an interstate telegram, does not interdict confirmation or verification of a telegram by Western Union where the copy of the telegram had already been given by complainant to the very persons to whom Western Union is alleged to have "divulged" its contents; and (c) the only effect of Western Union's action was to authenticate and to verify that which had already been divulged. As its second basic defense in support of its contention that as a matter of law it has not violated Section 605, Western Union argued that Section 605 does not prohibit disclosure of the name, address and telephone number of the person billed for a telegram. According to Western Union, this was the only information disclosed by it which was not evident on the fact of the telegram previously disclosed by the complainant.

4. At this point, it is also necessary to briefly refer to the Commission's a priori conclusions reached on the basis of the facts then before it which are set forth in its Memorandum Opinion and Order, supra, designating this complaint for hearing, in order to put Western Union's arguments now asserted before this Board in proper perspective. Relying on the general principles of law and policy as stated in

the cases of Nardone v. United States, 302 U.S. 379, 58 S. Ct. 275, 82 L. Ed. 314 (1937), United States v. Gruber, 123 F.2d 307 (2d Cir. 1941), United States v. Russo, 250 F. Supp. 55 (E.D. Pa. 1966), and United States v. Finn, 502 F.2d 938 (7th Cir. 1974), the Commission concluded, inter alia; on the basis of the factual data then before it that:

(a) The prohibitions of Section 605 apply to those employees of a carrier who have intimate knowledge of the content of a communication. (para. 8, MO&O.)

(b) Therefore, it appears that those employees of Western Union who disclosed information concerning the telegram were bound by the restrictions of Section 605 and that Western Union is thereby liable if any unlawful acts were committed by them in doing so. (para. 8, MO&O.)

(c) Section 605 clearly proscribes divulgence or publication of an interstate or foreign wire communication '...to any person other than the addressee, his agent, or attorney...' except for those exceptions in clauses (2) through (6). (para. 10, MO&O.)

(d) We find no support for Western Union's contention that the statute allows a carrier to divulge a telegram to a third party for purposes of verifying its existence and contents on the theory that the sender has implicitly consented to such divulgence merely by providing a copy of the message to a third party. (para. 10, MO&O.)

(e) We reject Western Union's argument that Section 605 does not prohibit the disclosure of telegraph company billing records. Western Union's reliance is misplaced on cases holding that disclosure for submission as evidence in a

> criminal proceeding of telephone toll records. . . is not proscribed by Section 605. *** The holdings of these cases with regard to telephone toll records have never been extended to telegraph records of any form. ***Telephone company accounting and toll records do not now, nor can they be associated with, any records of either the content or substance of conversations or the identity of the particular persons engaged in them. (para. 11, MO&O.)

The Initial Decision

5. The Initial Decision (FCC 77D-55) of Administrative Law Judge James F. Tierney was released October 28, 1977, and adversely resolved the issue relating to Western Union's liability under Section 605 for the unlawful acts of its customer service employees. More specifically, the Judge concluded that Western Union, through its customer service employees, violated Section 605 by (a) revealing to a third party (without the consent of the sender or receiver) the actual existence of the telegram and furnishing a copy of the company's file copy; (b) explaining to the same third party the code symbols on the file copy; and (c) providing to the same third party (without the consent of the sender or receiver) an affidavit certifying as to the facts shown by its file copy which recited erroneously one fact attested to as a true and correct fact (see n. 6, infra), and by attaching a copy of the company's file copy to the affidavit. In so holding, the Judge rejected Western Union's affirmative defenses that the telegram, in effect, had been previously made public by Strouth, that Section 605 applied only to the class of employees specifically defined by Section 605 as those engaging in transmitting and receiving the message, and that

because Strouth purportedly made improper use of Western Union's facilities it should be absolved of liability on the basis of its employees' honest mistakes. The Judge further concluded that Western Union's general practices and policies under Section 605 are inadequate. Recognizing that the issues in this proceeding do not include the imposition of a fine or penalty, the Judge called upon Western Union to voluntarily abandon a practice of divulging any message over the telephone "on the notion of the persuasiveness of the caller's 'story'."

6. With respect to Strouth, the Judge concluded that he failed to prove either (a) actual or compensatory damages or (b) punitive damages resulting from the unlawful activities of Western Union's customer service employees; accordingly, the Judge awarded Strouth nominal damages only, in the amount of $18.00. In this connection, it is to be noted that in a prior Memorandum Opinion and Order (FCC 76M-1453), released November 9, 1976, the Judge rules that the Commission lacked power to award punitive damages; however, he granted Strouth and the Bureau leave to appeal this ruling to the full Commission. By Memorandum Opinion and Order (FCC 77-609), released August 31, 1977, the Commission directed the Judge to determine whether the evidence warrants the imposition of punitive damages, reserving for a later date a determination of whether the Commission had the power to make such an award. As indicated above, the Judge concluded in his Initial Decision that there is no basis in this record for an award of punitive damages. Finally, the Judge concluded also that the Commission lacks jurisdiction to make an award to Strouth of costs incident to this litigation or counsel fees, even though there may be policy considerations favoring such an award.

Exceptions, Discussion, and Disposition

7. The proceeding is now before the Review Board on exceptions to the Initial Decision filed by Western Union and by Strouth, their replies in opposition to each other's exceptions, and the Common Carrier Bureau's opposition to Western Union's exceptions. There has been no request for oral argument, and we do not believe that oral argument is necessary for the resolution of this case before the Board. We have therefore reviewed the Initial Decision, in light of the exceptions and related pleadings and our own examination of the record.

8. No party has seriously taken issue with the accuracy of the findings of fact of the Initial Decision. The exceptions, in most part, challenge the legal effect to be given to the basic findings of fact in a number of respects. More specifically, Western Union is here insisting that (a) the acts of Strouth's counsel giving this telegram to Norsul's counsel and permitting a copy to be filed in a court file, take this case out of the terms of Section 605 prohibiting any divulgence because the "existence, contents, substance, purport, effect, or meaning" of the telegram were no longer confidential;[4] (b) the Judge misunderstood the Commission's Memorandum Opinion and Order (para. 4, supra); (c) the Judge ignored the important or decisive facts now revealed by this record relating to Strouth's acts as described in (a) above; (d) the Judge decided this case wrongly upon such

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[4] It appears that Western Union has now modified its prior contention (para. 3, supra) from one related to the implied consent of the sender, to one that the telegram no longer was confidential.

misconception of the decisive facta; and (e) the Judge's failure to address the question of whether "verification" constitutes "divulgence" is clear error. On this basis, Western Union reasserts again essentially the same contentions made previously to the Commission which now have a familiar theme and therefore are not repeated here. See para. 3, supra. It also challenges the Commission's a priori conclusions rejecting those contentions on the basis of the facts then before it, as well as the cases relied upon by the Commission to support its disposition. And in this connection Western Union vigorously asserts that the Commission's reliance on U.S. v. Gruber, supra, is misplaced and that the court's definition of "divulgence" is not controlling in the circumstances of this case because the court never considred the effect that prior disclosure by the sender might have on liability under Section 605. In short, in an effort to challenge the adverse conclusions of the Initial Decision, Western Union essentially contends that the Judge misunderstood the facts, and the Commission misinterpreted the law.

9. Strouth's exceptions primarily attack the Judge's adverse conclusions that he has not proven on this record either compensatory or punitive damages. Strouth further challenges the Judge's conclusions that the Commission has no power to award punitive damages, or costs and counsel fees incident to the subject proceeding. The Board agrees with the Judge's conclusion that Strouth has failed to prove compensatory or actual damages or punitive damages. In this regard, however, we disagree with the Judge's allowance of $18.00 nominal damages since it serves no purpose. We also need not, and do not, decide the question of the Commission's jurisdiction to award punitive damages since this question now remains in this proceeding

purely as an abstract one. We, however, adopt the Judge's conclusion that the Commission has no power to award costs and counsel fees incident to the subject proceeding.

10. We affirm also the Judge's adverse ultimate conclusions on the question (a) of Western Union's liability under Section 605; and (b) of the inadequacies of Western Union's existing procedures to prevent unauthorized disclosures under Section 605. We further affirm his conclusions that since Western Union employees dealt with a third party without the consent of the sender or receiver of the message, there was a divulgence within the prohibitive terms of the statute. In sum, it is the Board's view that the questions involved here relating to the decisional facts were properly evaluated by the Judge, and those relating to the law or policy under Section 605 with respect to Western Union's liability were properly interpreted by the Commission in its Memorandum Opinion and Order, supra. As will be shown more fully below, the Commission's interpretation of the law and policy applicable to the facts now revealed by this record with respect to Western Union's liability, are derived from the plain language and meaning of Section 605 and of related provisions of the Act (n. 3, supra), and follow fundamental concepts of statutory construction and the line of judicial decisions relied upon by it. In most respects, the Judge's conclusions relating to Western Union's liability are fundamentally consistent with those of the Commission, and except as modified by our decision herein, they are adopted. It is to be noted that on the basis of our discussion infra (paras. 14-17), we have determined that Western Union's defenses to the question of its liability, per se, under the "divulgence" prohibition of Section 605, are irrelevant. To the extent that any of the Judge's

conclusions may be inconsistent with our conclusions, the Judge's conclusions are not adopted by the Board. Several of Western Union's exceptions warrant further discussion, and we confine our decision below to those contentions.

11. No detailed analysis of the facts need be undertaken since a brief review patently reveals that the Western Union thesis relating to the Judge's purported misconception of the decisive facts and the Commission's purported misinterpretation of the law cannot prevail. Briefly stated, these are the facts as revealed by this record. In the fall of 1974, Strouth was prosecuting two lawsuits in Canada. The first was against Norsul, a company he was previously associated with, for collection of notes allegedly owed him, and the second was against Phoenix Oil and Mining Co. The latter resulted in a judgment to Strouth of $110,000. Norsul, however, obtained an injunction against payment of the funds, apparently on the grounds that the Phoenix judgment was based on transactions entered into while Strouth was associated with Norsul and that Norsul had no record of these events. In an attempt to document his position and oppose the injunction, Strouth contacted Hirschhorn, a friend and New York attorney who had also been associated with Norsul during the period in question, in order to obtain confirmation that Norsul had been aware of Strouth's dealing with Phoenix. Strouth spoke to Hirschhorn by telephone on September 21, 1974, and the same evening sent himself the telegram in question in Hirschhorn's name.[5] When the

[5] The telegram reads as follows: I confirm that I have been Norsul's New York council [sic] for more than 6 years during which time I have had full knowledge of Strouth Phoenix agreement and lawsuit and frequent conversations regarding it with other Norsul members."

telegram arrived in Canada, Strouth gave a copy to his local counsel, Leslie Duncan, who thereafter attached it to an affidavit and provided it to Norsul's counsel, William Code. The copy of the telegram was placed in a file in the Supreme Court of Alberta on September 30, 1974. The court scheduled a hearing on a Strouth petition to remove the injunction for October 4 and in that connection Code contacted Hirschhorn. When the latter would not confirm that he had sent the telegram, Code then telephoned a New York attorney, Robert E. Atkins, Jr., and instructed Atkins to investigate the identity of the author or sender.

12. At this point, it is noted that Atkins did not have either Strouth's original copy of the telegram, the copy placed in the file at the court, or the copy provided to Code by Strouth's counsel. Atkins merely had the text of the message, together with a telephone number which was read to him over the telephone by Code. The telephone number was one identified by the area code located in New York. Atkins' first contact with Western Union was on October 1, 1974, by telephone with an unidentified employee in customer service. Atkins informed the employee that he was an attorney, that he had the text of a telegram which was involved in court proceedings, and that time was of the essence in obtaining information about it. Without requiring reasonable proof of the identification of Atkins and reasonable proof of his oral representation, and without further requiring Atkins to secure the consent of the sender or receiver of the message, the Western Union employee, nevertheless, released to Atkins a copy of the company's file copy of the telegram. Since the file copy contained additional information, Atkins took it to a Western Union office where another unidentified customer service employee explained the sym-

bols on the telegram to him. Atkins then juxtaposed the information he had learned from the company's file copy and prepared an affidavit, for the signature of a Western Union employee, reciting the facts including the location from which the wire had been sent (the Hilton Inn at Kennedy Airport), the number to which it was billed (Strouth's New York office), together with an erroneous fact that the person calling in the telegram gave his name as Bernard Hirschhorn.

13. On October 3, 1974, Atkins took the affidavit to Western Union's main office where he located Jerry C. Campbell, Manager of Customer Services.[6] Atkins informed Campbell that he was an attorney, that he needed a Western Union employee to attest to the truth of the facts recited in the affidavit, that he was leaving for Canada that afternoon, and that time was of the essence. Campbell did not require Atkins to submit reasonable proof of his identification or reasonable proof of his oral representations. Campbell also did not investigate the accuracy of the representations set forth in the affidavit, and instead relied solely on his interpretation of the data in the file copy of the message attached to the affidavit. Since he believed that he was not providing Atkins with any new information and since he believed verification was within the scope of his duties, he signed the affidavit which

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[6] The Judge noted an unresolved conflict between the testimony of Atkins and Campbell as to whether Atkins told Campbell the telegram would be used in court. The Judge also noted that while Campbell believed the sender of the telegram to be Hirschhorn, other facts, i.e., that Strouth charged the telegram to his New York office, support Strouth's testimony that he identified himself as the sender.

certified as accurate a representation that the person calling in the message had, in fact, given his name as Bernard Hirschhorn. As indicated previously, the cost of the message was charged to Strouth's telephone number in New York; yet, Campbell disregarded this pertinent billing fact, and without ado certified to this erroneous fact. As also indicated previously, these customer service employees during the period October 2-3, 1974, when they were dealing with Atkins made no effort to secure the consent of the sender or receiver of the message prior to their disclosures, or to insist that he do so. Subsequently, Strouth complained informally to Western Union about the disclosures, and in November 1974 Western Union commenced its investigation of the matter. However, it was not until this subsequent investigation that Western Union had reasonable proof of either Atkins' identity, or of his oral representations.

14. As stated above, Western Union's major premise is that verification does not constitute "divulgence" within the prohibition of Section 605. Initially, we must therefore examine the question of whether its major premise has a proper factual foundation on the basis of the statute. Clearly, it does not. As shown above, Western Union would have us ignore the facts relating to the conduct of its employees, prior to their disclosures, including their failure to require Atkins (the third party inquirer) to provide (a) reasonable proof of his identity,[7] and his oral representations since he had only the text

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[7] While reasonable proof of identity is not emcompassed within the literal language of Section 605, we believe that prudent business practices warrant the imposition of this requirement on the basis of common sense.

of the mess ge as purportedly read to him over the telephone, and (b) the consent of the sender or receiver of the message. Stated a somewhat different way, Western Union would have us decide this question of its liability under the terms of the staute in total disregard of clauses (1)-(6) of Section 605, and instead solely and completely on its after the fact arguments based upon its after acquired proof of Atkins' identity and oral representations, as well as on its after acquired proof of the purported sender's conduct giving a copy of the telegram to his counsel who thereafter gave a copy to Norsul's counsel and filed a copy in a court file. This we cannot do.

15. For it is clear that on the basis of (a) the undisputed facts, (b) the purpose of Section 605 as a statute for the protection of the integrity of the communications system, and (c) the plain language of the statute and its plain meaning, the third party Atkins here did not establish any rights whatsoever under Section 605 to access to the company's file copy, but he was, nevertheless, provided the information he desired by Western Union's customer service employees. Since he did not have the consent of the sender or receiver, and since he is not a person or authority accorded rights of access under clauses (2)-(6) of the statute, the acts of Western Union employees constituted "divulgence" within the plain meaning of that word as used in the statute, irrespective of whether those acts are considered separately or collectively. As stated by the Commission in its Memorandum Opinion and Order, supra, "Section 605 clearly proscribes divulgence or publication of an interstate or foreign wire communication '...to any person other than the addressee, his agent or attorney...' except for those exceptions in clauses (2) through (6)." (Emphasis supplied). Viewed in this light, Western Union's major premise that verification

does not constitute divulgence within the prohibition of Section 605 is devoid of any factual foundation in terms of the statute to support it, and its major premise therefore cannot absolve it of liability because it not only contravenes the purpose of the statute and its plain language which require Western Union to accord absolute confidentiality to the company's file copy of a message absent the consent of the sender or receiver and except as otherwise specifically provided by clauses (2)-(6), it is inimical to them. Western Union's major premise is therefore irrelevant to our determination of the question of its liability. Similarly, its interrelated arguments based on legal niceties[8] relating to implied consent of the sender and honest mistakes of its employees are irrelevant to the question of its liability, per se, under the statute. Succintly put, all of these defenses built on Western Union's after the fact and after acquired proof serve the purpose only of distracting attention from the patent facts which constitute clear violations of Section 605, irrespective of

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[8] Western Union also argues that its disclosure of billing information, i.e., name, address and telephone number of the person billed, is not in itself illegal. Apart from the fact that Western Union's disclosures went well beyond mere billing information and were therefore in violation of the Act even if its argumet were accepted, we note that the billing information maintained by the carrier was associated with the text of the telegram itself and the identity of the sender and recipient. Thus, under Western Union's theory, it would be virtually impossible to protect the privacy of the contents and parties to a telegram, as intended by Section 605, if associated billing information was unprotected. See also para. 11 of the designation Order, 59 FCC 2d at 855.

whether the misconduct of Western Union employees here are considered separately or collectively.

16. Indeed, it may reasonably be stated that when viewed in this light and in terms of the purpose of Section 605, as well as its plain language, Western Union's defenses are "little less than fantastic" as aptly stated by the court in United States v. Gruber, supra.[9] While it is true as asserted by Western Union that the holdings of the court in the Gruber case are not controlling here, those holdings, nevertheless, support our analysis of the artificiality and transparency of Western Union's major premise, as well as the Commission's interpretation of the law. For the court in the Gruber case

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[9] In United States v. Gruber, supra, a defendant was convicted of aiding and abetting the interception and divulgence of a telephone communication in violation of the second clause of Section 605. A telephone operator had connected defendant's office to an intercepted call by means of the conference system. As a defense, it was contended that there was no interception or divulgence because the telephone operator never heard the conversations. The court rejected this stating: "The contention seems little less than fantastic. ***It can make no difference that the person divulging did not know the contents of the message. Whether he was never engaged in listening or could not understand the communication, so long as he caused it to be transmitted to a third party without the consent of the sender, he intercepted and divulged the communication and violated the statute as surely as though he had abstracted a telegram from a Western Union office and delivered it to some third party." 123 F.2d at 309.

further held that a person violates Section 605 simply when he causes a message to be transmitted to a third party without the consent of the sender. Indeed, in the Board's view there is no rational distinction that can be made between the facts in the instant case and those, for example, in the hypothetical illustration which follows: assume that unbeknown to Western Union a message is lost by a receiver, and a mere finder requests a Western Union employee to confirm the actual existence of the message, and without first requiring the mere finder to submit reasonable proof of his identity (see n. 7, supra), as well as the consent of the sender or receiver, the Western Union employee discloses the actual existence of the message shown by the company's file copy and also provides the mere finder with a copy of the company's file copy. Both are clear violations of Section 605 since the third party Atkins here and the mere finder in the hypothetical example established no rights under the terms of the statute to access to the company's file copy.

17. In short, it is the Board's further view that when the artificiality of Western Union's major premise that "verification" is not divulgence is viewed in its best light, it is merely a skillful attempt by it to carve out for itself an exception to the "divulgence" prohibition of the statute which it cannot do. For it is manifest that if the "divulgence" prohibition of the statute "to any person other than the addressee, his agent, or attorney" is to serve any purpose and not be an idle collection of words, any disclosure to a third party by Western Union can be made by it only with the consent of the sender or receiver, or as provided specifically by clauses (2)-(6). [10]

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[10] See n. 2, supra.

Accordingly, the Board concludes that Western Union's argument that the consent of the sender or receiver is irrelevant, is wholly without merit because it would defeat and destroy the plain meaning of the language of the statute. In reaching these concusions, we have carefully considered Western Union's assertion that adverse resolution of the question of its liability under Section 605 will virtually make it impossible for it to release copies of telegrams to persons who need them quickly and who have a "right" to them. According to Western Union, decisions on requests for copies of telegram messages would have to be made at the highest level, and it would be forced to abandon the business practices that have been followed for many years. Against the plain language and meaning of the "divulgence" prohibition "to any person other than the addressee, his agent, or attorney" upon which we have reached our adverse conclusions here, Western Union's contentions are wholly acceptable. For clearly pursuant to Section 605 no third party has a "right" to a copy of a telegram message without the consent of the sender or receiver, unless that third party comes within the proscribed exemptions (2)-(6). Therefore, our rejection of Western Union's claims for absolution based upon the plain language and plain meaning of the statute should impose less--not more--supervision by management because subordinate personnel have no discretion, and are required to follow the plain mandate of the statute.

18. We turn next to Western Union's contentions that the "divulgence" prohibition of the statute applies only to persons receiving, assisting in receiving, transmitting, or assisting in transmitting any interstate or foreign communication," and that its customer service employees involved here do not come within the class of

employees covered by the statute. At the outset, we recognize that the collected federal cases which are cited in support of the Commission's a priori legal conclusion[11] that "the prohibitions of Section 605 apply to those employees of a carrier who have intimate knowledge of the content of a communication," and those cited by Western Union[12] in support of its assertions here, do not establish a universal federal court view on the subject. We have therefore considered the descriptive employee language in conjunction with other related provisions of the Communications Act,[13] as well as on the basis of fundamental doctrines of statutory construction.[14] Briefly stated, it is our view that when this employee descriptive language is read in conjunction with the plain language of Section 3(i) and 217 of the Communications Act (n. 3, supra),

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[11] See para. 4, supra.

[12] Western Union cites United States v. Baxter 492 F.2d 150 (9th Cir. 1973), cert. denied 416 U.S. 940 (1974), and Bubis v. United States, 384 F.2d 643 (9th Cir. 1967). In these cases, the court held that there was no evidence that the telephone company employees involved were engaged in receiving or transmitting communications. In Bubis, a special investigative agent was involved, and in Baxter the opinion of the court did not indicate the role of the employee.

[13] See n. 3 supra.

[14] There are several rules of statutory construction which when considered separately or collectively, support the Commission's a priori conclusion that, as a matter of law, "the prohibitions of Section 605 apply to those employees of a carrier who have intimate knowledge of the content of a communication." The first is that all statutes

Western Union, as well as its customer service employees must, of necessity, come within the purported class of persons affected by the language of Section 605. Any other view, in the circumstances of this case, would be repugnant to the purpose of Section 605 as a statute designed to protect the integrity of the communications system. Despite the conflict of the interpretation of this descriptive language by federal courts in cases involving substantially different facts than those before us in the instant case, there is one line of federal cases which support our conclusions here, as well as the Commission's own sensible and reasonable a priori conclusion stated above. In United States v. Russo (E.D. Pa. 1966), supra, the court held that "this restriction is designed to apply to persons such as telegram ... operators, who must either learn the content of the message or handle a written record of communications in the course of their employment." (250 F. Supp. at 58.) In Hanna v. United States, 404 F.2d 405 (5th Cir. 1968), cert. denied 394 U.S. 1015 (1969), the court held that a security officer should be included among employees considered engaged in the transmission of communications. In United States v.

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should receive a sensible and reasonable construction. The second is that the literal words of a statute may be modified so as to bring a case out of the letter, and within the general object or mischief against which it is believed that the statute was directed. And the third is the cardinal rule that every part of a statute maust be construed in connection with the whole, so as to make all the parts harmonize, if possible, to give meaning to each. American Trucking Ass'n, 310 U.S. 534, 60 S.Ct. 1059, 84 L. Ed. 1345 (1940).

Covello, 410 F.2d 536 (2nd Cir. 1969), cert. denied 396 (U.S. 879, the court assumed that "... treatment of the entire telephone company as one person is the sounder construction of the statute." In United States v. Finn (7th Cir. 1974), supra, the court was willing to assume that the statute applied to any telephone company employee.

19. Finally, we cannot concur with Western Union that evidence of its past practices and policies under Section 605 which the Judge deemed inadequate, was not in issue in this proceeding, and that the Judge erred in making findings and reaching conclusions in this regard. The record establishes that the Judge during the course of the hearing repeatedly advised Western Union that he considered their Section 605 past practices and policies to be within the scope of the hearing. In the Board's view, its past practices are inextricably tied to the subject violations in the instant case, and hence are inextricably bound to the specified issue. The investigation of Western Union's violations in the instant case could not take place in a vacuum; indeed, its own "good faith defense"--which we now have ruled irrelevant to the question of its liability, per se, on the basis of our prior analysis of the artificiality and transparency of its major premise (paras. 14-17, supra)--presupposed inquiry into its usual Section 605 practices. Moreover, to the extent punitive damages were in issue, it was obviously necessary to ascertain Western Union's policies and practices in this area. It is plain therefore that Western Union had ample notice and opportunity to present evidence and litigate this matter on which it now claims apparent surprise. No more is necessary to satisfy the requirement of a fair hearing.

20. For all of the above reasons, we conclude that Western Union has raised no arguments or circumstances which alter the ultimate conclusion that its conduct and those of its customer service employees involved here are in violation of Section 605 of the Act. As stated earlier, however, Strouth has not shown that he is entitled to any damages stemming from this unlawful conduct.

21. ACCORDINGLY, IT IS ORDERED, That the complaint filed September 16, 1975, by Howard Steven Strouth IS DENIED.

Sylvia D. Kessler
Member, Review Board
Federal Communications Commission

Concurring Opinion of Board Member
Daniel R. Ohlbaum

This proceeding presents some novel questions. The first sentence of Section 605 of the Communications Act of 1934, as amended, 47 U.S.C. 605, provides with exceptions not relevant here, that, "no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, . . ."[1] Western Union, which concedes that its employees gave a file copy of the Strouth telegram and other information concerning the telegram to a person other than the addressee, his agent, or attorney, argues that the record does not support a finding that any of the employees who furnished information concerning the telegram are within the class of employees described in Section 605. It contends that no court has ever held that the first sentence of Section 605 applies to all common carrier employees, and that it has been held that it applies only to the specific class of employees named in the text of the law.

The cases construing the relevant portion of the statute arose primarily in situations involving violations of other statutes where the defendant

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[1] The first sentence of Section 605 was the first clause until 1968, when Section 605 was amended by the removal to the criminal code of the provisions dealing with the interception of wire communications. Public Law 90-351, 82 Stat. 197.

opposed the admission of evidence of telephone calls allegedly obtained in violation of Section 605. There is disagreement among circuits as to the statute's reach. In Bubis v. United States, 384 F.2d 643 (C.A. 9, 1967), relied upon by Western Union, the Pacific Telephone Company connected monitoring equipment to the telephone of a subscriber who was suspected of using a device to circumvent the telephone company's equipment which kept track of long distance calls. An agent of the company advised the United States Attorney's office of these matters and stated that some of the recorded conversations sounded like gambling. Subsequently, tapes of the conversations were produced pursuant to a subpoena when the subscriber was prosecuted for the interstate transmission of wagering information. The Court held that the exception for divulgence in response to a subpoena issued by a court of competent jurisdicition could not be relied upon to make the recorded conversations admissible because there was no evidence to indicate that the investigative employee who connected the monitoring equipment and who divulged the contents of the conversations had anything to do with the functions specified in Section 605. However, in Hanna v. United States, 393 F.2d 700 (C.A. 5, 1968), where the Court first described the relevant portion of Section 605 as applying to "those employees to whom the communications necessarily become known," it reversed itself on rehearing to hold that a security officer was within the class of employees described in the statute. 404 F.2d 405, cert. denied 394 U.S. 1015.

So far, however, no court has held that the first sentence of Section 605 covers all of a carrier's employees, without regard to their function. In 1974, the Seventh Circuit, finding that the record was silent on the facts, assumed

that the telephone company had been involved in installing a pen register, and also that the statute applies to any telephone company employees. It then went on to hold that pen register records could be divulged in response to a proper search warrant. United States v. Finn, 502 F.2d 938 (C.A. 7, 1974).[2] In United States v. Covello, 410 F.2d 536 (C.A. 2, 1969), the Court also assumed the validity of the argument that the entire telephone company should be treated as one person and went on to hold that the material divulged was not within the scope of Section 605. Returning to the question briefly in United States v. Baxter, 492 F.2d 150, 166 (C.A. 9, 1973), cert. denied 416 U.S. 940, the Ninth Circuit stated that the Second Circuit's assumption that the entire telephone company should be treated as one person was not available to defendants in the Ninth Circuit because of Bubis. Finally, in United States v. Russo, 250 F. Supp. 55 (E.D. Penn., 1966), noting that the purpose of Section 605 is to prohibit encroachments on the privacy of messages and to maintain the integrity of communication systems, the Court held that accounting data

[2] The Court's assumptions were helpful to the defendant because if the statute did not cover all employees, and if upon a remand it had been shown that the employees involved were not within the covered class, the first part of Section 605 could not have been invoked by the defense. In my opinion, the Commission's designation order, which cited Finn as holding that "persons" within the meaning of the section include both the carrier itself and persons employed by the carrier (59 FCC 2d 850, 853), reads too much into Finn. The use of an assumption by the Court is not the equivalent of a holding.

covering interstate telephone calls were not protected by Section 605 and that the first sentence of the statute has no application to telephone company accounting employees. The Court stated that the statutory restriction was "designed to apply to persons such as the telegram or radiogram operators, who must either learn the content of the message or handle a written record of communications in the course of their employment." (250 F. Supp. at 59).

None of these decisions, therefore, or any other decision I have been able to find, holds that the first sentence of the statute applies broadly to the carrier and all of its employees, although, on rehearing, the Fifth Circuit in Hanna seems to have gone quite far in that direction by including security personnel. And, as Western Union urges, the Ninth Circuit has given a somewhat narrow interpretation to the statute in Bubis v. United States, supra. However, the Ninth Circuit's view does not appear to do full justice to the purpose of Section 605, since it would permit rather wide divulgence by employees not directly concerned with handling traffic, although it is not entirely clear how that circuit would treat customer service personnel. While Bubis interpreted the first sentence of Section 605 with a different focus from the present proceeding, an attempt to distinguish the Ninth Circuit's holding solely on the basis of context does not seem advisable. Rather, I think the Ninth Circuit's narrow reading of the statute should not be followed. Other decisions indicate that the issue of the interpretation of Section 605 may still be resolved differently in other circuits, and the Commission should seek an interpretation that will do full justice to the law's broad aim.[3]

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[3] Although I have no problem with holding that

The Commission may properly note that the definition of "person" in Section 3(i) of the Communications Act, 47 U.S.C. 153(i), includes "an individual, partnership, association, joint-stock company, trust, or corporation."[4] Western Union is plainly a "person" under the Communications Act, and Section 605 may thus reasonably be construed as applying directly to Western Union as it acts through any of its employees who are acting within the scope of their dutires. It is true that Congress might have achieved this end by referring directly to common carriers in Section 605, but I think it clearly does no damage to the statute to so interpret it, and such an interpretation serves the purpose of protecting the integrity of the communications system. I therefore agree with the majority opinion that the statute applies to the carrier and its customer service personnel, but would go further than any decision to date appears to go, and also rest on the broad ground that the statute reaches the carrier acting through any of its personnel.

Western Union also urges that its employees merely verified information which had already been made public by Strouth himself and that such verification is not divulgence within the meaning of the statute. In the designation order the Commission appears to have left open this question, at least with respect to the filing of the telegram

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customer service employees are persons engaged in "receiving..." etc, in order to serve the statute's broad purpose, I would go further, as this opinion makes clear.

[4] Seciton 217, 47 U.S.C. 217, providing that the act of an employee or agent is the act of the carrier, is not helpful if the employee is not one of the class covered by Section 605 and Section 605 is given a narrow reading.

by Strouth's counsel in a Canadian court. The Commission stated (59 FCC 2d at 854) that, assuming Western Union's argument to be valid, it was not clear whether the telegram was divulged by the sender, recipient or agent prior to the acts of Western Union's employees in releasing the text of the telegram. The Commission also was not sure that the filing of the telegram in the Canadian proceeding made it a matter of public record. However, the Commission appeared to reject the related possibility that the carrier could divulge a telegram to a third party for verification on the theory that the sender has implicitly consented to such divulgence by supplying a copy of the telegram to the third party. Mere possession, the Commission said, is not enough to show that there was express or implied consent to release of the message. The record now resolves the factual questions raised by the Commission in the designation order. Strouth's agents gave the telegram to a third party and filed it in a public record prior to release of the material by Western Union employees. It is now clear that there was no further consent by Strouth to the release of the material.

In view of the broad language and purpose of Section 605, which contains the specific exceptions intended by Congress, the statutory purpose is best served by holding that the carrier and its employees are not relieved of the statutory prohibition on divulgence by any prior release of the material by the sender or addressee. To construe the statute otherwise leads to subtle distinctions which tend only to negate its purpose. None of the cases relied upon by Western Union in its exceptions holds or indicates that "verification" is permissible under Section 605. The general right of privacy cases may hold that a person's public life is not protected, but these cases do not

deal with a specific statutory prohibition which makes no such distinction. Maheu v. Hughes Tool Company, 352 F. Supp. 1179 (C.D. Cal., 1973), did not hold, as Western Union claims, that "authenticating information is not illegal publication;" rather, it held that where reporters could take their own notes at a press conference without being liable for defamation, the furnishing of a tape of the confeence to the reporters is not a publication but only a ministerial assistance to them. And, Carnes v. United States, 295 F.2d 598 (C.A. 5, 1961), cert. denied 369 U.S. 861, dealing with the question of whether there is an exception to a prohibition against interception under a different part of then Section 605 when a telephone conversation is listened to or recorded with the consent of only one of the parties to the conversation, held merely that where the consenting party and the third party are legally free to divulge the contents of a conversation, the only function of a recording is to preserve an accurate record, and that there is no essential difference between a recording and a person testifying to a conversation which he participated in or overheard. That case has no apparent relevance here. Western Union's contention that the statute permits verification of a telegram already made public by the sender should be rejected.

Of course, the fact of a prior release of a telegram would necessarily be relevant to the question of damages. A party who had already made public the text of a telegram would normally be hard put to demonstrate injury from a subsequent divulgence by the carrier. We need not further address that problem here because Strouth has failed to establish with the required specificity what his claimed damages were. Damages may be difficult of ascertainment, but

they must be established by the best evidence available. Garcia v. Mountain States Telephone and Telegraph Co., 315 F.2d 166 (C.A. 10, 1963); Thornell Barnes Co., 1 FCC 2d 1247, 1265 (Rev. Bd. 1965). It appears that Strouth had some extra expenses, at least in connection with deposition proceedings conducted in New York, as a result of information concerning his telegram which was released in contravention of the statute. However, no adequate specification of these damages was furnished, and the other alleged compensatory damages were clearly speculative. Finally, as the Administrative Law Judge held, no showing warranting punitive damages was made.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

HOWARD STEVEN STROUTH, Complainant	)	DOCKET NO. 20831
	)	File No. TS 42-75
v.	)	
	)	
THE WESTERN UNION TELEGRAPH COMPANY, Defendant	)	

ORDER

Adopted: September 26, 1978;
Released: October 5, 1978

By the Commission: Commissioner Washburn absent

1. The Commission has before it for consideration an application for review of Review Board Decision, FCC 78R-24, 42 RR 2d 1129, released April 3, 1978, filed May 3, 1978 by Howard Steven Strouth, and an opposition, filed May 18, 1978 by the Western Union Telegraph Company. The Commission also has before it a contingent application for review of the same Review Board Decision, filed May 3, 1978 by the Western Union Telegraph Company, which seeks review only in the event the Commission grants Strouth's application for review.

2. ACCORDINGLY, IT IS ORDERED, That pursuant to section 1.115(g) of the Commission's Rules, the application for review, filed May 3, 1978 by Howard Steven Strouth IS DENIED.

3. IT IS FURTHER ORDERED, That the contingent application for review, filed May 3,

1978 by the Western Union Telegraph Company IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 76M-1453
74341

In the Matter of	)	
	)	
HOWARD STEVEN STROUTH,	)	Docket No. 20831
Complainant	)	File No. TS 42-75
	)	
v.	)	
	)	
THE WESTERN UNION TELEGRAPH COMPANY,	)	
	)	
Defendant	)	

MEMORANDUM OPINION AND ORDER

Issued: November 5, 1976;
Released: November 9, 1976

By James F. Tierney, Administrative Law Judge:

1. At hand are Briefs filed, October 26, and 27, 1976, by the Parties addressed to the proposition whether, in this forum, assuming liability is eventually determined at trial, imposition of exemplary (also called punitive) damages may be levied against the offending party.

2. As a prefatory note, the Parties are to be commended, not only for promptitude, but equally, for the quality of the lawyer-like products they have submitted. And it is not an unnatural result, this being an adversary contest, to find that the positions of the private parties fail to harmonize.

3. In a word, both the Common Carrier Bureau (Bureau) and Howard Steven Strouth (Complainant) stress and urge that not only

historical legislative construction of the Interstate Commerce Act, 49 USCA 1, et seq., and derivatively the Communications Act of 1934, 47 USCA 1, et seq., but also the Administrative Procedure Act, 5 USCA, 551 et seq., support affirmatively the notion that "damages" which may be awarded, in cases such as this, fully comprehends the assessing of "exemplary or punitive damages." Indeed, the Bureau contends that separate from the "plain meaning rule" in the interpretation of legislative history in arriving at a reasonable constuction of Congressional intent, there is a "public policy reason" for allowing punitive damages as well, citing 22 Au. Jr., 2d 322, Scott v. Donald, 165 U.S. 58, 86 (1896) and Butz v. Glover Livestock Commission Co., 411 U.S. 182, 1973 (reh. den., 412 U.S. 933 (1973)). Also, addressing specifically the authority of an Administrative Law Judge to award damages, beyond those actually sustained (compensatory or general damages), the Bureau would have, analogously, the power of a federal district court judge inhere in the Administrative Law Judge, using in support a case where punitive damages have been awarded based on a violation of the Interstate Commerce Act, Wright v. Chicago, Burlington and Quincy Railroad Company, 223 F. Supp. 660 (N.D. Ill. 1963). That case, the Bureau notes further, was alluded to and discussed by this Commission in Richard Johnson, 18 FCC 2d 679 (1969) where the Commission stated at 681 ".... we are not prepared to rule at this time that we cannot award punitive damages in cases where such award may be warranted by the facts ...." In support of the Johnson thesis, the Bureau, echoed by the Complainant, cites Warrensburg Cable, Inc. v. United Telephone, 27 FCC 2d 727, 738 (1971) as reaffirming the Commission's position that, premised on the facts of a full record "punitive damages" may be levied.

4. If the positions of the Bureau and the Complainant may be paraphrased; should the record at trial establish the nature of the facts to suggest the inadequacy of general or compensatory damages, there can be no quesiton that additional, be they "exemplary," "punitive," "vindictive" or "smart" money damages, may, perhaps must, be awarded. Thus, they urge it would be in error and certainly premature to forecast, before trial, exclusion of that special form of "damages."

5. The defendant, Western Union, as suggested above, flatly asserts that the Commission, hence the Presiding Judge, has no authority to assess "punitive damages" while footnoting that, should its position not prevail, Complainant, in any event, would have to demonstrate by factual circumstances that "illegal acts" were committed with "actual malice" or "with conscious or reckless indifference to the interests of others" and, pointedly, that the defendant authorized or ratified these acts, citing Lake Shore & M.S. Ry. Co. v. Prentice, 147 U.S. 101 (1893). This caveat would appear to weaken the flat assertion of "no authority"; for should there be "no authority" all else would be pretense and rash presumption. Nevertheless, the defendant's general thesis warrants examination.

6. Defendant and complainant both agree and suggest that Section 206 of the Communications Act -- allowing liability against common carriers "for the full amount of damages sustained in consequence of any ... violation of this Act" -- derives directly from Section 8 of the Interstate Commerce Act, (49 USC 8); indeed the language of the two is virtually identical. However, the adversaries at bar part in their theses, one -- defendant -- urging that precedents "make clear that punitive damages are

not within the scope of Section 8, which precedent was "clearly established by the time Congress enacted Section 206 of the Communications Act" -- hence, defendant submits that it may be fairly inferred that Congress "ratified" the earlier interpretation accorded Section 8. Defendant, in support, cites Parsons v. Chicago & N.W.R. Co., 167 U.S. 460 (1897); Pennsylvania R. Co. v. International Coal Min. Co., 230 U.S. 184 (1913), among others.

7. On the other side, Complainant, Strouth, urges that Section 206 of the Communications Act derived of Section 8 of the Interstate Commerce Act does by analogous applicability permit the awarding of punitive damages citing Wright v. Chicago & Quincy Railroad, 223 F. Supp. 660 (N.D. Illinois 1963) which District Court case, premised on a finding of racial discrimination awarded a "refund of $8.40" "$500 to each plaintiff, compensatory damages" and "$500.00 each," punitve damages plus costs and sizeable attorney's fees. Rightfully, Complainant notes that our problem is not concerned with awarding of attorney's fees -- "a non-common law element of damages" reserved for court actions but the concern here is with the awarding of punitive damages "which are an element of common law damages." That Strouth has elected the Commission as his forum for remedy under the dual option in Section 206, a Court or the Commission, in no way diminishes, Strouth says, his right to receive "complete justice," presumably "full damages as at common law."

8. It is, of course, recognized that the question under scrutiny has most, if not all, of the elements of "first impression" in this agency. Thus, it is to be expected that the parties have had to bottom their respective

theses on the closest analogous case law, principally, those cases within the embrace of the Interstate Commerce Act. There is, to be sure, as noted earlier, Commission language in both Richard Johnson and Warrensburg Cable, supra, concerning its jurisdiction to award punitive damages which relates that the question "should be deferred until after completion of the evidentiary hearing and the submission of briefs by the parties." This language while, by no means, resolving the question at bar, is nevertheless to be rendered weighty respect, especially, in light of admixture, in administrative jurisprudence, of the rule of law and the promulgation of policy in the public interest, a matter alluded to in the Brief of the Common Carrier Bureau. Yet, it is neither contrary to the rule of law nor, certainly, disrespectful to suggest that whatever the condition or state under the American system, all power and authority, be it rule or policy, to be exercised must, find its genesis in the explicit or fairly implicit attributes of parental or enabling legislation supported by the full repositiory of legal tradition and judicial disposition in case law.

9. This is not to say, whatever the modest dimensions of this office, that one must shun judicial activism -- a kind of popular notion -- in favor of more accustomed notions of judicial restraint and inertia, or worse, judicial timidity. Still, before one may prudently, if not rationally infuse -- perhaps confuse -- in the judicial function something possibly totally at odds with its true nature, the fullest resort to wiser minds, past and present, seems the safer and saner route. The easier route would suggest, let the cause run its course and decide on the facts once established. To the extent that that route will be avoided may suppose a kind of an unbecoming activism.

10. Still the question remains. Punitve Damages? What are they? How, why and where did they originate? There is no question that they were recognized and applied in Common Law. Alladin Mfg. Co. v. Mantle Lamp Co. of America, 116 F.2d 708 (C.C.A. Ill.). Thus, it has been recognized that "the theory of exemplary or punitive damages involves the blending of the interests of society and those of aggrieved individuals, such damages being ordinarily regarded as awarded as a punishment of the defendant and a deterrent to him and others." Corpus Juris Secundum, 25 C.J.S. Section IIT(1). Margaret Ann Supermarkets, Inc. v. Dent, 64 So. 2d 291.

11. "Punitive" damages have been defined in the same context as "exemplary" damages; to wit;

> "Exemplary damages are damages in an increased scale, awarded to the plaintiff over and above what will barely compensate him for his property loss, where the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud or wanton or wicked conduct on the part of the defendant, and are intended to solace the plaintiff for mental anguish, laceration of his feelings, shame, degradation or other aggravations of the original wrong, or else to punish the defendant for his evil behavior or to make an example of him, for which reason they are also called 'punitive' or 'punitory' damages or 'vindictive' damages and (vulgarly) 'smart-money.' Springer v. Fuel Co., 196 Pa. St. 156 [other citations omitted]. It is said that the idea of punishment does not enter into the definition; the term being employed to mean an increased award in view of the supposed aggravation of the injury to the feelings of the plaintiff by the wanton or

reckless act of the defendant. Brause v. Brause, 190 Iowa 329, 177 N.W. 65, 70." Blacks Law Dictionary, Rev. Fourth Edition (1968).

12. "In general, and particularly in contracts and torts, damages are to be determined upon the particular circumstances and independent of the financial condition of the parties. Brown v. Klock, 117 N.Y. 340, 22 N.E. 944 (1889). But in cases where exemplary damages or punitive damages are permitted, such as slander, assault and battery, malicious prosecution, criminal conversation, seduction, negligence and trespass, proof of the financial standing of the defendant is relevant and generally allowed. Calder v. Southern R. Co., 89 S. Car. 287, 71 S.E. 841 (1911) [and others omitted. There are cases to the contrary. See, Ann. Cas. 1914 B 964.] Then, too, if the cause of action rests upon an injury to character, compensatory damages may be increased by the wealth of the defendant, Smith v. Satilla P. O. & S. Co., 152 Ga. 538, 110 S.E. 303 (1922); Johnson v. Smith, 64 Me. 553 (1875). For instances where exemplary damages are allowed, the financial standing and rank of the plaintiff may be proved on the ground that the inquiries are aggravated or increased by his or her circumstances and condition in life." [The latter cases usually have been confined to torts such as slander, malicious prosecution, assault and battery, seduction and breach of promise] The Chamberlayne Trial Evidence, 2d Ed., pp. 583-584, Section 608 (1936).

13. Much of the foregoing is related simply to give some historical origin or background of the introduction into our system of the awarding of punitive damages and to certify the notion that such damages were fully recognized and awarded

at common law. Whether one may easily transpose such remedy from that system to administrative law or jurisprudence, in the absence of specific legislative authority, is, of course, the heart of the debate here. Were one to accept the thesis, as the Bureau seems to argue, that besides implicit authority, granting such a remedy would be good "public policy," seems to beg the question. For if the implicaiton escapes the visibility of reason and the policy rests thereon, nothing remains.

14. Both Strouth, the Complainant, (plaintiff) and the Common Carrier Bureau rely with heavy emphasis on the Commission's language in Richard Johnson, supra, suggesting that this agency had tentatively decided it had authority to award punitive damages. Far be it from this person to attempt to thwart the supposed tentative judgment of better and wiser minds. On the other hand, this, as an administrative regulatory agency, is not, whatever its expansive Federal powers, a common law forum, albeit that most, if not all, ultimate or final actions must comport with "due process," which is a common law precept or pinciple in that all dispositions of finality must, under "due process" reflect or echo the law of the land, whose origin is grounded in the common law.

15. And it can be readily dismissed, as without meaningful consequence or significance, as Complainant precisely urges, that Section 414 of the Communications Act of 1934 preserving "common law" remedies were, nothing more than the affirmation that common law judicial remedies were in no way, to be frustrated, nor were parties, in a case or controversy, to be impeded in their choice of and quest for an adequate remedy under the law of the land, the Communications Act, notwithstanding. Hence, Section 414 is no bar to whatever disposition is made here.

16. Under Section 8 of the Interstate Commerce Act, the U. S. District Court in the Wright case, supra, decided, on discriminatory racial grounds, to grant compensatory damages against a railroad company and a tour agency, as well as "punitive damages" of $500 per plaintiff and a non-common law damage of attorneys fees of $1,500. Whether the law of the case in that Court can be presumed to be the law of the land--it being a Congressionally established Constitutional Court under Article III of the Federal Constitution vested not only with derivative common law authority but also Equity prerogatives (Cf. Sherman Antitrust Act and Clayton Antitrust Act, 15 USC 1, et seq., 15 USC, Section 4), is, at least, at the highest levels, unanswered, if not, under more convincing precedent, gravely undermined. The Clayton Act, for example, provides for proceedings "in equity". 15 USC Section 15, permitting suits by private persons and without respect to the amount in controversy further provides that the prevailing private persons "shall receive threefold the damages by him sustained." Even here, the Statute spells out the quantum of damages, "threefold."

17. Indeed, as matter which, in passing, may seem to add complexity to the question at bar is the fact that under Section 313 of the Communications Act of 1934 "all laws of the United States relating to unlawful restraints and monopolies ..." are declared applicable to interstate and foreign communications. But this seeming dilemma may be quickly, if not abruptly, answered. While the elements of an antitrust violation may, in the public interest, be considered and adjudged by the Commission in arriving at its sanction, the Commission, does not, affix -- it not being the "expert" forum -- or the enforcer of the antitrust laws -- nor can it provide, the multiple remedies including the nature and the the degree of damages authorized to the

regular judiciary. (Cf., NBC v. U.S., 319 U.S. 190, 222-224 (1934). U.S. v. Radio Corporation of America, 359 U.S. 334, 346-348 (1959).

18. Now, this disquisition cannot pretend to be the last word on a possible exhaustive, if not exhausting, subject; on the other hand, it would seem that this agency's legislative parent -- the Congress -- having had, on numerous occasions, over some forty-three years, not only the yearly reports and recommendations of the Commission to consider and scrutinize (47 USC 4(k)(5)) itself, nor prodded by the Commission, has seen fit to address the subject, under Title II, of the Communications act -- particularly Sections 206 and 207 -- of making more certain or precise what, it, the law-giver, imposes upon law-interpreter to consider, in the fulfillment of its duty or discretion, on the question of the quantum or the quality of damages, save for the explicit and prevailing language of Section 206 "for the full amount of damages sustained." Are we then to second-guess and implant in the minds of the legislature and substitute, sua sponte, worse, ipse dixit, a suggested forty-three year oversight?

19. Finally, it seems to this mind, and in spite of the seeming equivocation of the defendant in its footnote on Page 1 of its Brief, that by the application of all rational standards affecting construction of legislative history and "the plain meaning rule," there is nothing of substance to support the thesis that an administrative agency may, purely on "common law" premises, expand or exceed the rational bounds of the four-corners of its enabling legislation and precedential judicial explication or interpretation of its mandate. To learn some inkling of Congressional response to the subject of damages or penalties, in updating the Communications Act of 1934, one

need but look at Section 364, ($500 for each separate offense); Section 501 (Willful act -- upon conviction $10,000 or one year imprisonment -- subsequent willful act $10,000 or two years imprisonment); Section 502 (willful violation of rule, etc., in addition to other penalties $500 for each and every day the offense occurs); Section 503 (acceptance of rebates or offset against regular charges in interstate or foreign transmissions in addition to any other penalty, a sum of money three times the amount of money so received or accepted or three times the value of any other consideration); Section 503(b)(1), (2) and (3) (forfeiture limited to $10,000); not to speak of Sections 202, 203, 205, 504, 508, 509 and 510 which set prescribed forfeitures and fines. These specific Congressional acts in recent years are convincing indicators that matters of fines, forfeitures and damages were very much in hand in Congressional deliberations; not matters out of sight to be left to the disposition and judgment, however wise, of its delegates.

20. Like its derivative companion statute, the Interstate Commerce Act, the Communications Act of 1934 is replete with penalties varying in amounts, some of which are listed above. Principally, these penalties or forfeitures are assessed in favor of the United States as public wrongs. And unlike the disposition made by the District Court in the Wright case, supra, where the finding of degrading racial discrimination because of its social and humanly demeaning affect on the plaintiffs, may have prompted the assessment of "punitive damages," the Supreme Court in Penn R.R. Co. v. International Coal Co., supra, (230 U.S. 184, at 206-207) stated:

[Speaking to the language of the Interstate Commerce Act, Section 8, the twin language of Section 206 of the Communications Act.]

"This conclusion that the right to recover is limited to pecuniary loss suffered and proved is demanded by the language of the statute, the instruction put upon it years ago ... and is the view taken in the only other case we find in which this question under the Act to Regulate Commerce, has been construed. In Knudsen v. Michigan Central R. R., 148 Fed. Rep. 968, 974, it was said by the Circuit Court of Appeals for the Eighth Circuit 'that to support a recovery under the section there must be a showing of some specific pecuniary injury. A cause of action does not necessarily arise from these acts or omissions of a common carrier that may subject it to a criminal prosecution by the Government or to corrective or coercive proceedings at the instance of the [Interstate Commerce] Commission.'" (Emphasis added).

21. In that same case, again at p. 206, the Supreme Court observes: "The limitation of liability to the persons damaged and to an amount equal to the injury suffered is not out of consideration for the carrier who had violated the statute. On the contrary, the act imposes heavy penalties, indeptendent of the amount of rebate paid, and as each shipment constitutes a separate offense, the law in its measure of fine and punishment, is a terror to evil doers. But for the public wrong and for the interference with the equal current of commerce these penalties were made payable to the Government. If by the same act a private injury was inflicted, a private right of action was given. But the public wrong did not necessarily cause private damage, and when it did, the pecuniary loss varied with the character of the property ... so that instead of giving ... the right to recover a penalty fined in amount or measure, the statute made the

guilty carrier liable for the full amount of the damages sustained -- whatever they might be..." (Emphasis added).

22. At this late stage, and in spite of the briefly articulated reasons, distinguishing "malice" and "motive" for the imposition of punitive damages in Wright, supra, to suggest that Congress has, by hint or whisper, in the intimacy of delegator and delegatee, endowed this agency with the full range of common law remedies in the assessing of damages, is barren of otherwise convincing precedential suport and the theses, at hand, in consonance with that slim premise must be rejected.

23. All of this is not to say that the Complainant is bereft of a wider choice of remedy beyond the confines of the Communications Act, which provides the dual forums of the Commission or a United States District Court. Presumably, and assuming the meeting of other jurisdictional requirements, were the litigants of diverse citizenship, which may be the case here, suit might be lodged with a United States District Court, in the nature of a common law complaint, applying or invoking the common law or tradition of the host State of the forum, (See, Federal Rules of Evidence, Rule 302, P.L. 93-595, 88 Stat., January 2, 1975), e.g., negligence of whatever degree -- where the alleged negligent act is causally connected to not only damages actually sustained but, because of its obvious "aggravation," possibly persuasive of derivative "examplary or punitive damages." Under such a suppositious legal venture, a Court, under its mandate, may be persuaded on the evidence to levy the type damages sought here, but, not so, in this view, under the statute comprehending the Communications Act of 1934. Nowhere in the case law available to the parties and this person, with the sole exception of Wright, which does not

go so far, is the principle or thesis enunciated and pronounced that an administrative agency has been bestowed with the same powers as the regular courts in assessing damages, particularly "exemplary or punitive." The contrary would appear the case; and neither "the plain meaning rule" in statutory construction nor, however attractive, "good public policy" fortifies or justifies exercise of a power not given as "demanded by the language of the statute."

24. Finally, it is not too much to say, in spite of certain latter day deprecations of lawyer's language, as "legalese" or "legal-speak" our system of justice -- aluded to by Complainant's Brief -- is grounded on equal treatment to the strong as well as the weak, indeed in the dispensing of justice there is neither the favored or unfavored nor rich nor poor and, were it otherwise, there would be no justice.

25. In sum, then again commending the work-products of the several adversary advocates and noting that, in this forum, the right to object and take exception to the final disposition, at this level, endures without the need to so record; under the designation Order and the issues presented in this proceeding, for the foregoing reasons and under the precedent reviewed here, except for actual damages sustained and proved, there can be no award of "punitive damages."

26. Because of the apparent novelty of the question at bar and, assuredly, because of the modesties of this office and its scholarship, the parties are at liberty to seek review of this disposition without the necessity of filing the customary requests for permission under Rule 1.301(b) (47 CFR 1.301(b)).

SO ORDERED.

James F. Tierney
Administrative Law Judge
Federal Communications Commission

Not to be Published - See Local Rule 8 (f)

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

NO. 78-2078 September Term, 1979

Howard Steven Strouth, Petitioner

v.

Federal Communications Commission,
and United States of America, Respondent

Western Union Telegraph Company, Intervenor

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BEFORE: Robb, Wilkey and Wald, Circuit Judges

JUDGMENT

This cause came on to be heard on a petition for review of an order of the Federal Communications Commission and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court, that the order of the Federal Communications Commission under review herein is hereby affirmed.

Per Curiam
For the Court

George A. Fisher
Clerk

CHARLTON, IMSE & TUPLING
ATTORNEYS AT LAW
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WASHINGTON, D. C. 20006

TELEPHONE (202) 296-2975

February 5, 1980

r. George A. Fisher
lerk
nited States Court of Appeals
istrict of Columbia Circuit
ashington, D.C. 20001

Re: Howard S. Strouth v. F.C.C. #78-2078
Supplemental Reply to Federal Communications Commission's letter dated January 25, 1980.

ear Mr. Fisher:

This office's response to Judge Wilkey's question was based upon r understanding of matters to be addressed.

While unusual, we feel compelled to further respond to the ratuitous comments of the F.C.C. concerning its "intent" to take ction or refrain from action because of the pendency of this case.

We deem it improper for the Commission to argue facts ot in the record and not supported by any evidence whatever, i.e., subjective intent to correct the violation of the act as proven by the etitioner in the future but refraining from doing so because of the endency of this action.

The facts in the record show that after the Commission agreed at the asserted violations had occurred, it refused to order any corrective tion (which it had the power to do) while vacating even the nominal mages awarded by the Administrative Law Judge. At the eleventh our the Commission now asserts that it intends (impliedly) to take tion against Western Union to prevent future violations of the Act. the Commission had intended to take corrective action it could have ne so through the exercise of its injunctive regulatory power. It refused do so. It is clear beyond doubt, based upon the administrative cord that the Commission is wholly ineffective in preventing the olation of the act which in fact indisputably occurred, so that the blic interest can only be protected by this Court.

Attachment
A

BEST COPY AVAILABLE

It cannot be expected that the confidentiality of regulated communications can be maintained unless this Court imposes a significant financial sanction upon Western Union in the face of admitted violations of the Act. The F.C.C.'s attempted assertion of an eleventh hour defense against such sanctions, relying upon assertions not of record, certainly is as transparent to this Court as to the petitioner.

Respectfully submitted,

Walter T. Charlton

cc: Joel Yohalem, Esq.
James R. Jamison, Jr., Esq.
United States Attorney for the
District of Columbia, Charles F.C. Ruff
U.S. District Courthouse
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February 1, 1980

Mr. George A. Fisher
Clerk
United States Court of Appeals
District of Columbia Circuit
Washington, D.C. 20001

Re: Howard Steven Strouth v. F.C.C., #78-2078

Dear Mr. Fisher:

This letter is in response to the letter of the Federal Communications Commission dated January 25, 1980, which in turn was in response to an inquiry of Judge Wilkey at oral hearing. The petitioner deemed it appropriate and necessary to respond to the Federal Communications Commission's representations which we believe were not totally responsive to Judge Wilkey's questions.

Our recollection of Judge Wilkey's specific questions as paraphrased are:

1. Does federal law provide for prosecution by the F.C.C. of the type of violations committed by Western Union? Judge Wilkey also specifically mentioned that it was his understanding that the violations constituted misdemeanor offenses.

2. Can the F.C.C. prosecute these specific individuals under the aforementioned criminal provisions of federal law for the violations which occurred in this case?

Answer to question No. 1:

Our research as to the penalties under federal law of proven violations of Section 605 of the Communications Act (47 U.S.C. §605) indicate that the criminal penalties for wrongful disclosure of wire communications transmitted by a common carrier by any "person" were transferred to 18 U.S.C., § 2511 by the Omnibus Crime Control Act of 1968 (86 Stat. 212; P.L. 90-351 (1968)). The penalty for violations of the provisions of said act are a fine of not more than $10,000 or imprisionment for not more than five years, or both. (18 U.S.C. § 2511(1); (c), (d). Effective June 19, 1968). Reference to this criminal statute is included in petitioner's brief, Appendix A, which is attached to the brief, page 4. Thus, if our understanding of applicable law is correct, the violations constitute felonies, not misdemeanors.

Attachment
B

Answer to question No. 2:

The Federal Communications Commission does not of itself prosecut criminal actions. Actual prosecution falls under the Office of the Attorney General. Violations are referred by the F.C.C. to the Attorney General's office for prosecution where appropriate. In this case it is our understanding that no such prosecutions had been recommended as of the date of oral hearing. This understanding is substantiated by the comments made in Mr. Jameson's letter of January 25, 1980.

However, as a practical matter under the facts of this case, no criminal prosecution is practical, indeed perhaps impossible. This is because the facts clearly proven at trial show that Western Union keeps no list of disclosures actually made nor of the persons making such disclosures. The only known Western Union employe who committed a violation (Mr. Jerry Cambell) was granted immunity by the government in exchange for his testimony at trial. Hence, the correct answer to Judge Wilkey's question is, as to the violations committed in this case by Western Union, no criminal prosecution is practical, if possible at all.

Transcript references to the foregoing have been omitted in the interest of clarity. In the event further clarification or amplification of the above is required, we will be happy to respond upon request.

Respectfully submitted,

Walter T. Charlton

Walter T. Charlton

cc: Joel Yohalem, Esq.
James R. Jamison, Jr., Esq.
United States Attorney for the
District of Columbia

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

1/28/80

January 25, 1980

IN REPLY REFER TO:

eorge A. Fisher, Clerk
nited States Court of Appeals
istrict of Columbia Circuit
ashington, D.C. 20001

Re: Howard Steven Strouth v. FCC, No. 78-2078

ear Mr. Fisher,

t oral argument in the above-captioned case held on January 1, 1980, Judge Wilkey requested that the Respondent, Federal ommunications Commission, effect a written submission commenting on two issues. Judge Wilkey's specific questions ertained to the existence of any criminal statutes applicable o violations of Section 605 of the Communications Act and hat, if anything, had the Commission done to insure the dequacy of Western Union's 605 policing procedures.

iolations of Section 605 can be the subject of criminal rosecution under Section 501 of the Act. See 47 U.S.C. §501, 605. With respect to the Court's second question, he Litigation Division has been informed that when the ommission considered Mr. Strouth's application for review f the Review Board's decision disposing of his complaint gainst Western Union, the Commissioners directed the staff o make a letter inquiry of Western Union concerning its ractices to protect the privacy of telegraphic communications. e have been further advised that the staff responsible for arrying out this request has delayed doing so because of concern about the possibility of an intrusion upon the ourt's jurisdiction.

Attachment
C

The Litigation Division, after making its own evaluation of the Commission's directive and its possible relationship with the issues now before the Court, has advised the staff that we do not believe there will be any interference with this Court's jurisdiction if they proceed to carry out the Commission's request without further delay.

Sincerely,

James R. Jamison, Jr.,
Counsel

cc: All parties